Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

M.J.B.,

Petitioner,

v.

V.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Parents have a fundamental right to decide upon the proper care and upbringing of their children. Here, against the wishes of a mother, a court ordered visitation with an unrelated third party. No one alleged that the mother was unfit or that her decision would cause the children substantial harm. Rather, in applying the state's visitation statute and its definition of parent, the court decided that the third party was a "psychological parent" and ordered visitation after determining it was in the children's best interests. Did the state court's decision violate the mother's constitutional rights?

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The opinion of the New Jersey Supreme Court (App. A, *infra*, 1a-41a) is reported at *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (2000). The opinion of the New Jersey Superior Court, Appellate Division (App. B, *infra*, 42a-94a) is reported at *V.C. v. M.J.B.*, 319 N.J. Super. 103, 725 A.2d 13 (1999). The opinion of the Superior Court of New Jersey, Chancery Division, Docket No. FD-07-875-98, (App. C, *infra*, 95a-117a) is unpublished.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court entered its decision on April 6, 2000. Jurisdiction is based upon 28 U.S.C. § 1257(a). 28 U.S.C. § 2403(b) may apply and notifications required by Rule 29.4(c) have been made.

STATUTORY PROVISIONS INVOLVED

The relevant portions of N.J.S.A. § 9:2-3 (West 1993) provide that "[w]hen the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgments or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced . . ."

N.J.S.A. § 9:2-4 provides, in pertinent part, that

> [t]he Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or

> dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal . . .

N.J.S.A. § 9:2-13(f) states that "[t]he word 'parent,' when not otherwise described by the context, means a natural parent or parent by previous adoption."

Three other statutes also relate to this case, but due to the amount of text involved, they are reprinted in the appendix (App. D, *infra*, 118a-120a):

- N.J.S.A. § 9:3-43 (West 1993), New Jersey's adoption statute (relevant section);
- N.J.S.A. § 9:2-7.1 (West 1993), New Jersey's grandparent and sibling visitation statute; and
- N.J.S.A. § 37:1-10 (West 1968), New Jersey's statute abolishing common law marriage.

STATEMENT OF THE CASE

The question M.J.B. proposes for review can be best understood in the context of the following relevant facts:

A. The Factual History Prior to Court Intervention

V.C. and M.J.B, a lesbian couple, began dating in July 1993. Prior to the relationship, M.J.B. had been planning to become pregnant via artificial insemination, and in fact, she

was in the initial stages of the process during the time that she began to see V.C. On September 29, 1994, shortly after the couple moved into the same apartment, M.J.B. gave birth to twins — a boy and a girl. Until the couple broke up in August 1996, V.C., M.J.B. and the twins acted like what many would call a family. The children referred to M.J.B. as "mommy," and although V.C. was not physically related to the children, they called her "meema."

In February 1995 the couple purchased a home together, and later that year, V.C. asked M.J.B. to "marry" her. While there is no statute in New Jersey that permits same-sex marriages, the couple held a commitment ceremony to memorialize their bond. They also discussed the possibility of having V.C. adopt the twins, but this never came to fruition. In June 1996 the couple consulted an attorney about the possibility of adoption, but they never actually took the necessary steps to begin the process because M.J.B. decided not to give her consent.

While there are differing accounts as to the extent of the relationship between V.C. and the twins, there can be no denying that V.C. assumed some responsibility for their care during the 21-month period that the couple lived together. Nonetheless, while V.C. described herself as a "co-parent," M.J.B. saw her more as a helper. In its decision below, the New Jersey Supreme Court referred to V.C. as what it called a "psychological parent." Under the court's ruling, a third party may take on this status if certain requirements are met: 1) "the legal parent must consent to and foster the relationship between the third party and the child;" 2) "the third party must have lived with the child;" 3) "the third party must perform parental functions for the child to a significant degree;" and 4) "a parent-child bond must be forged." (App. A, *infra*, 25a-26a).

V.C. and M.J.B broke up in August 1996. For a short time, M.J.B. allowed V.C. to visit with the children, but shortly thereafter M.J.B. decided to discontinue the relationship because she believed the children were suffering from stress based upon continued contact with V.C. In addition, M.J.B. felt that V.C. was not properly caring for them. At about the same time, both parties began relationships with new partners.

B. V.C. Files Suit Against M.J.B

In response to M.J.B.'s decision not to permit visitation, V.C. filed an action against her in the Family Part of the Chancery Division of the Superior Court of New Jersey. In the suit, V.C. sought joint custody and visitation with M.J.B.'s twins. At trial, both parties presented expert testimony about the effect separation would have on the children. Neither expert testified that substantial harm or potentially substantial harm would result from lack of contact with V.C. However, V.C.'s expert did say that the children might feel "unnecessary guilt and assume that they made V.C. angry or somehow caused the parties' separation." (App. A, *infra*, 8a). Despite this, the expert testified that "the children could adapt to the loss of V.C." and he admitted that "the long-term effects were unknown." (App. A, *infra*, 8a).

After hearing the evidence, the Family Part judge denied both custody and visitation. In denying joint custody, the judge determined that V.C., as a third party, lacked the standing necessary to petition the court for custody absent a showing that M.J.B. was unfit. He also determined that, under New Jersey law, there was no basis for visitation since V.C. did not stand *in loco parentis* to the children. While V.C.

argued that visitation was appropriate under the theory that she was a "psychological parent," the trial court rejected this notion. In fact, it stated that even if it applied the theory, V.C. failed to establish the required elements to qualify as a "psychological parent."

On appeal, with one judge dissenting, the Appellate Division of the Superior Court affirmed the lower court's decision to deny joint legal custody. Nonetheless, the appeals court differed with the trial court on the issue of visitation. It reversed the lower court's order, and it required M.J.B. to allow visitation based upon its determination that V.C. had established a parent-like relationship with the children and based upon its conclusion that visitation would be in their best interests. The visitation decision was not unanimous. The dissenting judge believed that "a parent ought to have the right to decide who maintains a relationship with her children and what is in their best interests." (App. B, *infra*, 73a). Thus, he felt that there was no basis to order visitation over M.J.B.'s objection, particularly since there was no legislative authority to do so.

Based upon the dissents, both parties appealed to the Supreme Court of New Jersey as a matter of right. *See* N.J. R. Civ. P. 1:2-1(a)(2). The New Jersey Supreme Court affirmed, albeit for slightly different reasons. It held that under New Jersey's statutory definition of parent, *see* N.J.S.A. § 9:2-13(f) (West 1993), V.C. could qualify for joint custody and visitation if she could prove that she was a so-called "psychological parent." (App. A, *infra*, 19a-22a, 31a). As such, V.C. could obtain joint custody and/or visitation rights if a judge determined that it was in the best interests of M.J.B's children — even if M.J.B. objected. After finding that V.C. was a "psychological parent," the court

decided not to award joint legal custody. Despite this, however, it did require M.J.B. to permit visitation. It did so based upon its determination that visitation with V.C. would be in the best interests of M.J.B.'s children.

C. How the Federal Question Was Presented

M.J.B. presents this case to the Court in order to determine whether the United States Constitution prohibits a state from overriding a fit biological parent's decision not to allow a third party to visit with her children. M.J.B. initially raised this constitutional question in its brief to the trial court. There was no need for the trial court judge to reach the constitutional issue, because he denied visitation and custody on other grounds. The appeals court recognized a natural or adoptive parent's "right to the custody, care and nurturing of their children." (App. B, *infra*, 59a). However, it determined that when a third party "stands in the shoes" of a parent, lack of fitness was not a prerequisite to court intervention. Instead, it held that custody or visitation could be determined by a court after it determined the best interests of the child. (App. B, *infra*, 59a-60a, 67a).

M.J.B. also raised this constitutional issue in its brief to the New Jersey Supreme Court. That court addressed the issue in its opinion and held that the "[t]he right of parents to the care and custody of their children is not absolute." (App. A, *infra*, 18a). It determined that a parent's right to custody and control "may be usurped" in cases where there is proof of unfitness, abandonment, gross misconduct or when there are other "exceptional circumstances." (App. A, *infra*, 18a). According to the New Jersey court, in instances where a third party qualifies as a "psychological parent," the state may infringe upon the biological parent's right to care and custody. (App. A, *infra*, 18a-19a).

REASONS FOR GRANTING THE WRIT

As noted in the question presented, M.J.B. asks this Court to determine whether New Jersey's Supreme Court applied its child visitation statute in an unconstitutional manner. Three reasons support the granting of M.J.B's petition:

1) New Jersey's decision conflicts with the rationale behind this Court's decision in *Troxel v. Granville*[1];

2) the issue presented for review is of exceptional national importance because New Jersey impermissibly intruded upon family decision making, a right reserved to parents; and

3) New Jersey's decision conflicts with those of other states, where courts say that parental decisions should not be second-guessed absent unfitness or some other compelling circumstance.

I.

THE NEW JERSEY SUPREME COURT'S OPINION CONFLICTS WITH THIS COURT'S RECENT DECISION IN *TROXEL v. GRANVILLE*.

The State of New Jersey substituted its own judgment about what was in the best interests of M.J.B's children for her own determination. This case is not about whether the best interests of the twins should be protected. Rather, it is about who should make that determination, the State or their

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1. __ U.S. __ , 120 S. Ct. 2054 (2000)

mother. No court ever held that M.J.B. was unfit or ever found that her parental decision to discontinue visitation seriously harmed, or could potentially seriously harm, the children. In addition, the lower courts gave no special weight whatsoever to M.J.B.'s wishes. These facts place the case squarely in conflict with the principles announced by the Court recently in *Troxel v. Granville*, __ U.S.__, 120 S. Ct. 2054 (2000) (decided after the New Jersey Supreme Court's decision in this case).

Several cases decided by this Court recognize that parents possess a fundamental constitutional right to direct the upbringing of their children. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Most recently, in *Troxel*, the Court stated that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." __ U.S. at __, 120 S. Ct. at 2060. As a result, in most cases, a determination that a parent is unfit is a prerequisite to state involvement in parental decision making:

> There is a presumption that fit parents will act in the best interests of their children . . . [a]ccordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at __, 120 S. Ct. 2061 (citation omitted).

Factually, this case parallels *Troxel*. There, a surviving parent decided to limit visitation from her deceased husband's parents. The grandparents filed suit based upon a state visitation statute, and the trial court, in applying the statute, ordered visitation contrary to the wishes of the parent. This Court criticized the trial court because its decision "failed to provide any protection for [the parent's] fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at __, 120 S. Ct. at 2062. Moreover, it stated that "if a fit parent's decision of the kind at issue here [visitation from a third party] becomes subject to judicial review, the court must accord some special weight to the parent's own determination." *Id.*

As in *Troxel*, the lower courts here (both New Jersey's Supreme Court and appeals court) gave no special consideration to the wishes of a fit parent. Rather, they usurped M.J.B.'s right to make decisions for her children simply because they felt that they could do better. *Cf. id.* at __, 120 S. Ct. at 2059, 2064. According to *Troxel* this impermissible. We cannot take away a parent's right to make decisions just because she does not make the "right" decisions. This is especially true, as here, where there is no showing of serious harm or potentially serious harm to the children.

The New Jersey Supreme Court's decision conflicts with *Troxel*, and it swims against the tide of the many cases that recognize the protected interest parents have when they raise their children. Based upon this conflict, granting of the petition for writ of certiorari is warranted.

II.

NEW JERSEY IMPERMISSIBLY INTRUDED UPON AN IMPORTANT FEDERALLY PROTECTED RIGHT RESERVED FOR PARENTS: FAMILY DECISION MAKING.

For many, parental decision making goes to the core of daily living. A parent is called upon to make innumerable decisions in the course of a child's life. Therefore, when a state intrudes upon parental rights, the decision to do so has broad implications for an untold number of American families. For this reason, the decision by the New Jersey Supreme Court transcends the interests of the parties and has implications for millions of American households. [2]

New Jersey's court issued a broad ruling that does not limit itself to same-sex couples. Rather, the court announced a standard applicable to all persons who take on a parental role. (App. A, *infra*, 1a-2a). Consequently, the decision would also apply to unmarried heterosexual couples. In fact, as one state court noted, the "psychological parent" theory (a.k.a. the *de facto* parent theory) can apply to a wide-range of relationships, including "long-standing day-care providers, relatives, successive sets of stepparents, or close family friends." *Dexter v. Titchenal*, 693 A.2d 682, 688 (Vt. 1997).

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2. While the numbers vary dramatically, one source estimates that in 1991 at least 1.5 million children nationwide were being raised by gay or lesbian couples. Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 Hastings L.J. 177 (1991).

Even more consequential than the breadth of the decision is the message that it sends. The New Jersey Supreme Court, in its own words, stated that a biological mother and an unrelated third party stood in parity and were "essentially equal." (App. A, *infra*, 31a, 34a). As a result, the court felt that it could second-guess the decision of a fit parent and require her to allow someone — someone she determined should not have contact with the children — to see her kids. This is troublesome, because the court substituted its own determination of what was in the twins' best interest for that of their mother. It is even more troublesome because the court did so absent any indication that the decision would cause, or potentially cause, substantial harm to the children. Thus, without a compelling basis to do so, the court usurped M.J.B.'s right to determine what was in the best interest of her own family.

According to one commentator, this type of "usurpation of the parental role by the state as *parens patriae* might indeed lead to a standardization of moral, ethical, and educational values and infringe on fundamental interests, countering our traditional notions of liberty and individuality." Samuel V. Schoonmaker, III, *et al.*, *Constitutional Issues Raised by Third-Party Access to Children*, 25 Fam. L.Q. 95, 114 (1991). Concededly, this is a bold statement. At a minimum, however, the decision by the New Jersey Supreme Court raises a significant constitutional question that deserves this Court's attention. In fact, in the past, articles that discussed third party access to children predicted that this was an area that would ultimately need United States Supreme Court review. *See, e.g., id.* at 115; *see generally*, Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga. L. Rev. 975 (1988).

This case presents an issue of national importance for the Court's consideration. On a daily basis parents are called upon to make vital — and even not-so-vital — decisions for their children. Most often the decisions will be right. Occasionally they will be wrong. Rarely should they be second-guessed. By granting M.J.B.'s petition for writ of certiorari, this Court can stress the last proposition to state courts throughout the country. And in doing so, it can send the message that only compelling circumstances justify interference in family decision making.

III.

NEW JERSEY'S DECISION CONFLICTS WITH THOSE OF OTHER STATES, WHERE COURTS SAY THAT PARENTAL DECISIONS SHOULD NOT BE SECOND-GUESSED ABSENT UNFITNESS OR SOME OTHER COMPELLING CIRCUMSTANCE.

In addition to conflicting with the principles announced in *Troxel*, New Jersey's decision conflicts with decisions by the highest courts of other states. New Jersey's sister state, New York, is the best example; however, the decision also conflicts with the rationale behind third party visitation cases decided in other states.

The New Jersey court decided that a fit biological parent could be forced to allow visitation with a third party upon a finding that the biological stranger acted as a so-called "psychological parent" or *de facto* parent. The court felt that this decision passed constitutional muster and acted as an exception to a biological parent's protected fundamental rights based upon the conclusion that "[t]he rights of parents to the care and custody of their children is not absolute."

(App. A, *infra*, 18a). In considering the same question, the New York State Court of Appeals reached the opposite conclusion.

In *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), the New York court confronted the same factual scenario faced by New Jersey. A biological mother denied visitation to her former lesbian domestic partner, and the partner turned to the courts in an attempt to overrule the mother's decision. After finding that a "biological stranger to [the] child" lacked standing under a New York statute to apply for visitation, *id.* at 29, the court addressed the third party's claim that she was a *de facto* parent. In rejecting this notion, the court pointed out that New York would traditionally recognize the rights of a fit parent over a nonparent — even in cases "where the nonparent had exercised some control over the child with the parents' consent." *Id.* According to the opinion,

> [t]o allow the courts to award visitation — a limited form of custody — to a third person would necessarily impair the parents' right to custody and control [citation omitted]. Petitioner concedes that respondent is a fit parent. Therefore she has no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interest.

Id.

In deciding *Alison D.*, the New York Court of Appeals relied upon its prior decisions in *Ronald FF v. Cindy GG*, 511 N.E.2d 75 (N.Y. 1987) and *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976). *Ronald FF* recognized that parents have a fundamental right to choose with whom their children

associate, and it stated that absent a compelling state interest that furthers the interests of the child, the state is powerless to interfere in a parent's choice. 511 N.E.2d at 77. Similarly, according to *Bennett*, "[t]he court and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity." 256 N.E.2d at 281, 283. Thus, unless exceptional circumstances can be shown (*i.e.*, "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time"), a parent's right would be superior to that of a nonparent.[3] *Id.* at 281.

As can be seen, New York rejects the *de facto* parent (a.k.a. "psychological parent") theory as an exception to a fit parent's right to direct the upbringing of their children. Other states reach similar conclusions; however, they do not directly mention the constitutional issue. *See, e.g.*, *Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997) (holding that the court does not have the equitable power to adjudicate third party visitation determinations and rejecting the so-called "psychological parent" theory); *Cooper v. Merkel*, 470 N.W.2d 253 (S.D. 1991); *D.G. v. D.M.K.*, 557 N.W.2d 235 (S.D. 1997) (both holding that in order to grant visitation to a third party over the wishes of parent, "a clear showing against the parent of gross misconduct, unfitness or other extraordinary circumstances affecting the welfare of the child must be present"); *In re Marriage of Freel*, 448 N.W.2d 26 (Iowa 1989) (refusing to allow third-party visitation absent legislative authority).[4] This is not meant to be a

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3. *Bennett* was a custody case rather than a visitation case.

4. While this case does not involve grandparent visitation, the issue is, to a degree, analogous. Thus, it is significant that several

(Cont'd)

comprehensive list. In addition, concededly, some states agree with New Jersey. *See, e.g., Custody of H.S.H.-K.*, 193 N.W.2d 419 (Wis.), *cert. denied sub. nom Holtzman v. Knott*, 516 U.S. 975 (1995).

While New York's conflict with New Jersey is the most apparent, a review of the decisions in this area of the law shows that for various reasons the law from state-to-state is inconsistent at best. In fact, one article points out that in many third party cases, "[c]ourts do not [even] uniformly acknowledge that the parents have fundamental constitutionally protected rights to raise their children free from state interference . . ." Samuel V. Schoonmaker, III, *et al., Third Party Access to Children: Update on Constitutional Issues*, 25 Fam. L.Q. 117, 119 (1991). The same article notes that even when courts are presented "head-on constitutional challenges to a visitation statute," they "continue to sidestep the issues." *Id.*

A decision in this area by the United States Supreme Court would go a long way toward clarifying the role of the state when third parties seek visitation over the objections of a parent. Thus, by granting M.J.B.'s petition for writ of

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(Cont'd)
state courts have found that legislation supplanting a fit parent's determination regarding such visitation would fail to meet the requirements of the United States Constitution. *See, e.g., Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999) (statute requiring grandparent visitation, unless visitation was found not to be in the best interests of the child, found unconstitutional); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995) (absent showing of harm to the children, grandparent visitation statute violated parents right to raise their children without undue interference from the state).

certiorari, the Court could establish much-needed precedent for the states to follow.

CONCLUSION

It is difficult to imagine issues that are more important than those relating to how parents raise their children. The issue presented for review is of exceptional importance. M.J.B. asks the Court to mark out a constitutional threshold and hold that a state may not second-guess the decisions of a fit parent absent the most compelling of circumstances. The New Jersey Supreme Court failed to recognize the fundamental rights possessed by parents, and it impermissibly invaded the family sphere. The decision conflicts with the rationale of a more recent decision of this Court, and it also conflicts with the decisions by the highest-level courts of other states.

For all these reasons, M.J.B. respectfully asks that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY DATED AND DECIDED APRIL 6, 2000

V.C.,

Plaintiff-Respondent and Cross-Appellant,

v.

M.J.B.,

Defendant-Appellant and Cross-Respondent.

Supreme Court of New Jersey.

Argued Oct. 25, 1999.

Decided April 6, 2000.

* * *

The opinion of the court was delivered by

LONG, J.

In this case, we are called on to determine what legal standard applies to a third party's claim to joint custody and visitation of her former domestic partner's biological children, with whom she lived in a familial setting and in respect of whom she claims to have functioned as a psychological parent. Although the case arises in the context of a lesbian couple, the standard we enunciate is applicable to all persons who have willingly, and with the approval of

the legal parent, undertaken the duties of a parent to a child not related by blood or adoption.[1]

I

The following facts were established at trial. V.C. and M.J.B., who are lesbians, met in 1992 and began dating on July 4, 1993. On July 9, 1993, M.J.B. went to see a fertility specialist to begin artificial insemination procedures. She prepared for that appointment by recording her body temperature for eight to nine months prior for purposes of tracking her ovulation schedule. She had been planning to be artificially inseminated since late 1980. According to M.J.B., she made the final decision to become pregnant independently and before beginning her relationship with V.C. Two individuals who knew M.J.B. before she began dating V.C., confirmed that M.J.B. had been planning to become pregnant through artificial insemination for years prior to the beginning of the parties' relationship.

According to V.C., early in their relationship, the two discussed having children. However, V.C. did not become aware of M.J.B.'s visits with the specialist and her decision to have a baby by artificial insemination until September 1993. In fact, the doctor's records of M.J.B.'s first appointment indicate that M.J.B. was single and that she "desires children."

Nonetheless, V.C. claimed that the parties jointly decided to have children and that she and M.J.B. jointly

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1. For the purpose of this opinion the term legal parent encompasses biological and adoptive parents.

researched and decided which sperm donor they should use. M.J.B. acknowledged that she consulted V.C. on the issue but maintained that she individually made the final choice about which sperm donor to use.

Between November 1993 and February 1994, M.J.B. underwent several insemination procedures. V.C. attended at least two of those sessions. In December 1993, V.C. moved into M.J.B.'s apartment. Two months later, on February 7, 1994, the doctor informed M.J.B. that she was pregnant. M.J.B. called V.C. at work to tell her the good news. Eventually, M.J.B. was informed that she was having twins.

During M.J.B.'s pregnancy, both M.J.B. and V.C. prepared for the birth of the twins by attending pre-natal and Lamaze classes. In April 1994, the parties moved to a larger apartment to accommodate the pending births. V.C. contended that during that time they jointly decided on the children's names. M.J.B. admitted consulting V.C., but maintained that she made the final decision regarding names.

The children were born on September 29, 1994. V.C. took M.J.B. to the hospital and she was present in the delivery room at the birth of the children. At the hospital, the nurses and staff treated V.C. as if she were a mother. Immediately following the birth, the nurses gave one child to M.J.B. to hold and the other to V.C., and took pictures of the four of them together. After the children were born, M.J.B. took a three-month maternity leave and V.C. took a three-week vacation.

The parties opened joint bank accounts for their household expenses, and prepared wills, powers of attorney,

and named each other as the beneficiary for their respective life insurance policies. At some point, the parties also opened savings accounts for the children, and named V.C. as custodian for one account and M.J.B. as custodian for the other.

The parties also decided to have the children call M.J.B. "Mommy" and V.C. "Meema." M.J.B. conceded that she referred to V.C. as a "mother" of the children. In addition, M.J.B. supported the notion, both publicly and privately, that during the twenty-three months after the children were born, the parties and the children functioned as a family unit. M.J.B. sent cards and letters to V.C. that referred to V.C. as the children's mother, and indicated that the four of them were a family. The children also gave cards to V.C. that indicated that V.C. was their mother. M.J.B. encouraged a relationship between V.C. and the children and sought to create a "happy, cohesive environment for the children." M.J.B. admitted that, when the parties' relationship was intact, she sometimes thought of the four of them as a family. However, although M.J.B. sometimes considered the children "theirs," other times she considered them "hers".

M.J.B. agreed that both parties cared for the children but insisted that she made substantive decisions regarding their lives. For instance, M.J.B. maintained that she independently researched and made the final decisions regarding the children's pediatrician and day care center. V.C. countered that she was equally involved in all decision-making regarding the children. Specifically, V.C. claimed that she participated in choosing a day care center for the children, and it is clear that M.J.B. brought V.C. to visit the center she selected prior to making a final decision.

Appendix A

M.J.B. acknowledged that V.C. assumed substantial responsibility for the children, but maintained that V.C. was a mere helper and not a co-parent. However, according to V.C., she acted as a co-parent to the children and had equal parenting responsibility. Indeed, M.J.B. listed V.C. as the "other mother" on the children's pediatrician and day care registration forms. M.J.B. also gave V.C. medical power of attorney over the children.

A number of witnesses testified about their observations of the parties' relationship and V.C.'s role in the children's lives. V.C.'s mother testified that M.J.B. told her that V.C. and M.J.B. would be co-parents to the children and that the parties made a joint decision to have children. In addition, she observed that M.J.B., V.C. and the children functioned as a family. Likewise, L.M., a co-worker and friend of M.J.B., testified that she spent time with the parties before, during and after M.J.B.'s pregnancy, and that she regarded the parties as equal co-parents to the children.

Another co-worker and friend of M.J.B., D.B., also testified that V.C. was a co-parent to the children. In addition, D.B. revealed that M.J.B. planned to continue the relationship between V.C. and the children after the breakup, as long as V.C. contributed money toward the children's expenses. However, another witness, A.R., indicated that V.C. was minimally involved in taking care of the children, but acknowledged that V.C. had an important role in the twins' lives. Testifying for M.J.B., both A.R. and M.I. stated that they regarded M.J.B. as the children's primary caretaker.

Together the parties purchased a home in February 1995. Later that year, V.C. asked M.J.B. to marry her, and M.J.B.

accepted. In July 1995, the parties held a commitment ceremony where they were "married." At the ceremony, V.C., M.J.B. and the twins were blessed as a "family."

Together, V.C. and M.J.B. joined the Lambda family organization, made up of lesbian and gay parents or expectant parents. The Lambda family organization is a social group in which children become aware of other families that also have gay and lesbian parents. V.C. and M.J.B., together with the children, attended at least ten Lambda functions.

Additionally, as a group, V.C., M.J.B. and the twins attended family functions, holidays, and birthdays. According to V.C., she did not attend family functions with M.J.B.'s family because they were unhappy about M.J.B.'s sexual orientation. However, V.C. claimed that M.J.B. had a very good relationship with V.C.'s mother, S.D., and that the children were very close to V.C.'s family. Apparently, the children referred to S.D. as "Grandma," and to V.C.'s grandmother, as "great-grandma."

During their relationship, the couple discussed both changing the twins' surname to a hyphenated form of the women's names and the possibility of V.C. adopting the children. M.J.B. testified that the parties considered adoption and in June 1996 consulted an attorney on the subject. M.J.B. paid a two thousand dollar retainer, and the attorney advised the parties to get letters from family and friends indicating that the parties and the twins functioned as a family. The parties never actually attempted to get the letters or proceed with the adoption. V.C. alleged that M.J.B. was willing to go through with the adoption even after the parties split.

Just two months later, in August 1996, M.J.B. ended the relationship. The parties then took turns living in the house with the children until November 1996. In December 1996, V.C. moved out. M.J.B. permitted V.C. to visit with the children until May 1997. During that time, V.C. spent approximately every other weekend with the children, and contributed money toward the household expenses.

In May 1997, M.J.B. went away on business and left the children with V.C. for two weeks. However, later that month, M.J.B. refused to continue V.C.'s visitation with the children, and at some point, M.J.B. stopped accepting V.C.'s money. M.J.B. asserted that she did not want to continue the children's contact with V.C. because she believed that V.C. was not properly caring for the children, and that the children were suffering distress from continued contact with V.C. Both parties became involved with new partners after the dissolution of their relationship. Eventually, V.C. filed this complaint for joint legal custody.[2]

At trial, expert witnesses appeared for both parties. Dr. Allwyn J. Levine testified on behalf of V.C., and Dr. David Brodzinsky testified on behalf of M.J.B. Both experts arrived at similar conclusions after having examined the women individually and with the children, and after examining the children separately.

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2. As noted by scholars, "Joint custody can be either joint legal and joint physical custody or joint legal custody with one parent having primary residential custody. Legal custody refers to decision making." Gary N. Skoloff & Laurence J. Cutler, New Jersey Family Law Practice, Custody § 4.2B (8th ed.1996).

Dr. Levine concluded that both children view V.C. as a maternal figure and that V.C. regards herself as one of the children's mothers. "[B]ecause the children were basically parented from birth" by V.C. and M.J.B. "until they physically separated," Dr. Levine concluded that the children view the parties "as inter-changeable maternal mothering objects" and "have established a maternal bond with both of the women."

Dr. Levine likened the parties' relationship to a heterosexual marriage. Consequently, the children would be affected by the loss of V.C. just as if they had been denied contact with their father after a divorce. Dr. Levine explained that the children would benefit from continued contact with V.C. because they had a bonded relationship with her. Dr. Levine further noted that if the children felt abandoned by V.C., they might also feel unnecessary guilt and assume that they made V.C. angry or somehow caused the parties' separation. Although the doctor believed that the children could adapt to the loss of V.C., he indicated that the long-term effects were unknown. Furthermore, Dr. Levine indicated that the animosity between V.C. and M.J.B. could harm the children, but surmised that counseling could lessen the parties' animosity.

Likewise, Dr. Brodzinsky concluded that V.C. and the children enjoyed a bonded relationship that benefitted both children. Dr. Brodzinsky determined that the children regarded V.C. as a member of their family. The doctor believed that it was normal for young children to feel that way about a person with whom they have spent considerable time. However, Dr. Brodzinsky noted that as children "get

older, family becomes more specifically tied . . . to biological connections." The doctor's report indicated that, when asked who their mother was, the children did not immediately point to V.C., but upon further inquiry agreed that V.C. was their mother. The doctor further noted that the children viewed M.J.B's new partner as a current member of their family. Dr. Brodzinsky expressed concern that, if visitation were permitted, the parties' animosity would negatively impact the children. The doctor, however, acknowledged that counseling would reduce the level of animosity between the parties. Dr. Brodzinsky further recognized that the children would suffer some short-term stress from the loss of V.C. but would likely recover in time.

In contrast to Dr. Levine's opinion, Dr. Brodzinsky believed that the loss of V.C. was not akin to the loss of a parent in a heterosexual divorce. The doctor explained that societal views foster the expectation that a child and a parent will continue their relationship after a divorce, but that no similar expectation would exist for the children's relationship with V.C. Still, Dr. Brodzinsky testified that "[t]he ideal situation is that [M.J.B.] is allowed to get on with her life as she wants, but to the extent possible that . . . these children be able at times to have some contact with [V.C.] who's important to them." Assuming that the parties could maintain a reasonably amicable relationship, Dr. Brodzinsky felt that the children "would probably benefit from ongoing contact [with V.C.] as they would with any person with whom they have a good solid relationship that can nurture them."

The trial court denied V.C.'s applications for joint legal custody and visitation because it concluded that she failed

to establish that the bonded relationship she enjoyed with the children had risen to the level of psychological or de facto parenthood. In so doing, the court gave significant weight to the fact that the decision to have children was M.J.B.'s, and not a joint decision between M.J.B. and V.C.

Finding that V.C. did not qualify as a psychological parent to the children, the trial court opined that it would "only be able to consider [V.C.'s] petition for custody if [she] was able [to] prove [M.J.B.] to be an unfit parent." Because V.C. did not allege that M.J.B. was an unfit parent, the trial court held that V.C. lacked standing to petition for joint legal custody. The court also denied V.C.'s application for visitation, determining that even a step-parent would not be granted such visitation except for equitable reasons, not present here. Further, it resolved that visitation was not in the children's best interests because M.J.B. harbored animosity toward V.C. that would "inevitably pass[ ] along to the children." According to the trial court, the case might have been different had V.C. "enjoyed a longer and more irreplaceable relationship with the children. . . ." Upon the entry of judgment, V.C. appealed.

On March 5, 1999, an Appellate Division panel decided the case in three separate opinions. 319 N.J.Super. 103, 725 A.2d 13. Judge Stern authored the majority opinion, which affirmed the denial of V.C.'s application for joint legal custody but reversed the denial of her petition for visitation. Id. at 106, 725 A.2d 13. In so doing, the court concluded that V.C. had established a parent-like relationship and "stood in the shoes of a parent." Id. at 119, 725 A.2d 13. The majority analyzed the case under the best interests of

the child standard, and, based on the record before it, determined that joint legal custody was not in the best interests of the children. Id. at 119, 725 A.2d 13. The trial court's judgment denying V.C.'s petition for joint custody was affirmed. Id. at 119-20, 725 A.2d 13.

As to visitation, although recognizing that animosity between the parties is an important factor in the best interests test, the majority concluded that M.J.B. cannot deprive V.C. or the twins of visitation simply because M.J.B. harbors negative feelings toward V.C. Id. at 118, 725 A.2d 13. Relying on the experts' testimony, the majority concluded that V.C.'s continued contact with the children is in their best interests; therefore, it reversed the judgment denying V.C.'s petition for visitation and remanded for proceedings to establish a visitation schedule. Id. at 119-20, 725 A.2d 13.

The two partial dissenters staked out opposite positions on the issues. Judge Braithwaite determined that V.C. does not qualify as a psychological parent and thus would have denied both joint custody and visitation. Judge Wecker concluded that V.C. qualifies as a psychological parent and that the best interests standard necessarily applies to both visitation and custody. Id. at 137, 725 A.2d 13. She would have granted visitation on the record before her and remanded for a best interests hearing on joint custody.

An order for visitation was established on March 26, 1999. Both M.J.B. and V.C. appealed as of right from the dissents discussed above. R. 2:2-1(a)(2). M.J.B. also moved for a stay. Thereafter, we denied M.J.B.'s stay motion and accelerated the appeals.

Appendix A

II

On appeal, M.J.B. argues that we lack subject matter jurisdiction to consider V.C.'s custody and visitation claims because the legislative scheme and the common law do not recognize her rights; that V.C. lacks standing to claim custody and visitation because she has not asserted parental unfitness; that V.C.'s application intrudes on M.J.B.'s basic liberty interest in raising her children as she sees fit; that protection of the children from serious harm is the only basis for governmental intervention into her private life with her children; that she has an absolute right to decide with whom her children will associate; that V.C. was the equivalent of a nanny whose status deserves no special acknowledgment; that she did not give consent to V.C.'s role as a "parent"; and finally that the Appellate Division erred in substituting its fact-finding for that of the trial court.

V.C. counters that she qualifies as a parent under N.J.S.A. 9:2-13(f); that she is a psychological parent[3] of the twins thus justifying the invocation of the court's parens patriae power to sustain that relationship; that in such circumstances the best interests test applies; and, on her cross-appeal, that denial of joint legal custody was erroneous because of her status as a de facto parent.

Various amici filed briefs supporting the arguments advanced by V.C. including the American Civil Liberties

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3. The terms psychological parent, de facto parent, and functional parent are used interchangeably in this opinion to reflect their use in the various cases, statutes, and articles cited. Psychological parent is the preferred term.

Union of New Jersey, the American Civil Liberties Union Foundation, the Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the Lambda Families of New Jersey. Those amici (collectively referred to as the "ACLU") are non-profit organizations that are committed, among other things, to defending the civil liberties and rights of gay and lesbian families and individuals. According to the ACLU, it submitted a brief "primarily because it is concerned about M.J.B.'s sweeping attack on the de facto parent doctrine, which has long served to protect children in this State by protecting their important relationships with adults who function as parents to them."

In addition, we granted Concerned Women For America ("CWA") the right to appear as amicus curiae in order to argue its case against a "heavy judicial hand favoring the homosexual agenda." CWA asserts that the courts "are deliberately misconstruing the law to reach a politically correct result." According to CWA, the Legislature is the appropriate forum for this discussion.

III

We turn first to M.J.B.'s claim that we lack jurisdiction and that V.C. lacks standing to apply for joint custody and visitation because neither the statutes nor the common law acknowledge the existence of such a cause of action by a third party.

A

There are no statutes explicitly addressing whether a former unmarried domestic partner has standing to seek

custody and visitation with her former partner's biological children. That is not to say, however, that the current statutory scheme dealing with issues of custody and visitation does not provide some guiding principles. N.J.S.A. 9:2-3 prescribes:

> When the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgments or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced. . . .

Further, N.J.S.A. 9:2-4 provides, in part, that

> [t]he Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal. . . .

By that scheme, the Legislature has expressed the view that children should not generally be denied continuing contact with parents after the relationship between the parties ends.

N.J.S.A. 9:2-13(f) provides that "[t]he word "parent," when not otherwise described by the context, means a natural

parent or parent by previous adoption." M.J.B. argues that because V.C. is not a natural or adoptive parent, we lack jurisdiction to consider her claims. That is an incomplete interpretation of the Act. Although the statutory definition of parent focuses on natural and adoptive parents, it also includes the phrase, "when not otherwise described by the context." That language evinces a legislative intent to leave open the possibility that individuals other than natural or adoptive parents may qualify as "parents," depending on the circumstances.[4]

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4. We note that all fifty states, to one extent or another, grant statutory standing to third parties to petition for custody and/or visitation of the biological or adoptive children of others. Those statutes reveal a full spectrum of approaches. Examples are: Ark. Code Ann. § 9-13-102 to -103 (Michie 1999) (granting reasonable visitation rights to siblings, grandparents and great-grandparents); 750 Ill. Comp. Stat. Ann. § 5/607(b)(1) (West 1999) (granting standing for visitation to grandparent, great-grandparent, or sibling if in child's best interests); Mo.Rev.Stat. § 452.402 (West 2000) (standing for grandparents to petition for visitation); Neb.Rev.Stat. Ann. § 43-1802 (1999) (granting standing to grandparents for visitation in certain circumstances); N.H. Rev.Stat. Ann. § 458:17-d (1999) (granting grandparents standing to petition for visitation); N.Y. Dom. Rel. Law § 72 (McKinney 1999) (standing for grandparents to petition for visitation if in child's best interests); N.D. Cent.Code § 14-09-05.1 (1999) (standing to grandparents for visitation unless not in the child's best interests).

The more expansive statutes allow third parties, without regard to blood relationship, to seek both custody and visitation. Examples include: Conn. Gen.Stat. Ann. § 46b-57, -59 (West 1999) (allowing custody or visitation to "any interested third-party . . . upon such conditions and limitations as [the court] deems equitable");

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If a statute is clear and unambiguous on its face, the court must determine the intent of the Legislature from its plain meaning. Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613, 725 A.2d 1104 (1999) (citing Board of Educ. v. Neptune Township Educ. Ass'n, 144 N.J. 16, 25, 675 A.2d 611 (1996) (quoting State v. Butler, 89 N.J. 220, 226, 445 A.2d 399 (1982))). Moreover, statutory "language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." In re Sussex County Mun. Utils. Auth., 198 N.J.Super. 214, 217, 486 A.2d 932 (App.Div.1985) (quoting Hackensack Bd. of Educ. v. Hackensack, 63 N.J.Super. 560, 569, 165 A.2d 33 (App.Div. 1960)).

By including the words "when not otherwise described by the context" in the statute, the Legislature obviously envisioned a case where the specific relationship between a child and a person not specifically denominated by the statute would qualify as "parental" under the scheme of Title 9. Although the Legislature may not have considered the precise

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(Cont'd)

Haw.Rev.Stat. Ann. § 571-46(2), (7) (West 1999) (granting standing to third persons for custody when in the best interests of child and granting de facto parent prima facie award of custody; visitation standing granted to "any person interested in the welfare of the child" in court's discretion); Mass. Gen. Laws Ann. ch. 208, § 28 (West 1999) (granting standing to any third party to petition for custody if court deems such award expedient or in child's best interest); Or.Rev.Stat. § 109.119(1) (granting standing to "[a]ny person . . . who has established emotional ties" for either custody or visitation); Va.Code Ann. § 16.1-241(A) (Michie 1999) (granting standing to "any party with a legitimate interest" to petition for visitation or custody of child).

case before us, it is hard to imagine what it could have had in mind in adding the "context" language other than a situation such as this, in which a person not related to a child by blood or adoption has stood in a parental role vis-a-vis the child. It is that contention by V.C. that brings this case before the court and affords us jurisdiction over V.C.'s complaint.[5]

B

Separate and apart from the statute, M.J.B. contends that there is no legal precedent for this action by V.C. She asserts, correctly, that a legal parent has a fundamental right to the care, custody and nurturance of his or her child. Watkins v. Nelson, 163 N.J. 235, 245, 748 A.2d 558 (2000); Matter of D.T., 200 N.J.Super. 171, 176, 491 A.2d 7 (App.Div.1985). Various constitutional provisions have been cited as the source of that right, which is deeply imbedded in our collective consciousness and traditions. Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551, 559 (1972) (citing Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1112, 86 L.Ed. 1655, 1660 (1942) (equal protection clause)); Griswold v. Connecticut, 381 U.S. 479,

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5. The legislative grant of power is what distinguishes this case from West v. The Superior Court of Sacramento, 59 Cal.App.4th 302, 69 Cal.Rptr.2d 160 (1997); Van v. Zahorik, 227 Mich.App. 90, 575 N.W.2d 566 (1997), aff'd, 460 Mich. 320, 597 N.W.2d 15 (1999); and Titchenal v. Dexter, 166 Vt. 373, 693 A.2d 682 (1997), cited by M.J.B. for the proposition that we lack jurisdiction over V.C.'s claim. Each of those cases was decided based on an absence of legislative authority evidenced by a legislative scheme that did not include the kind of language employed here.

496, 85 S.Ct. 1678, 1688 14 L.Ed.2d 510, 522 (1965) (Goldberg, J., concurring) (privacy guarantees). In general, however, the right of a legal parent to the care and custody of his or her child derives from the notion of privacy. According to M.J.B., that right entitles her to absolute preference over V.C. in connection with custody and visitation of the twins. She argues that V.C., a stranger, has no standing to bring this action. We disagree.

The right of parents to the care and custody of their children is not absolute. For example, a legal parent's fundamental right to custody and control of a child may be infringed upon by the state if the parent endangers the health or safety of the child. Wisconsin v. Yoder, 406 U.S. 205, 233- 34, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15, 35 (1972); Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S.Ct. 438, 442, 88 L.Ed. 645, 652-53 (1944). Likewise, if there is a showing of unfitness, abandonment or gross misconduct, a parent's right to custody of her child may be usurped. Watkins, supra, 163 N.J. at 237, 748 A.2d 558; Guardianship of K.H.O., 161 N.J. 337, 347, 736 A.2d 1246 (1999); Adoption of Child by D.M.H. & S.H., 135 N.J. 473, 481, 641 A.2d 235 (1994); New Jersey Div. of Youth Fam. Serv. v. K.M., 136 N.J. 546, 557, 643 A.2d 987 (1994); In re Adoption of Children by D., 61 N.J. 89, 95, 293 A.2d 171 (1972); Zack v. Fiebert, 235 N.J.Super. 424, 428, 563 A.2d 58 (App.Div.1989); D.T., supra, 200 N.J.Super. at 176, 491 A.2d 7.

According to M.J.B., because there is no allegation by V.C. of unfitness, abandonment or gross misconduct, there is no reason advanced to interfere with any of her

constitutional prerogatives. What she elides from consideration, however, is the "exceptional circumstances" category (occasionally denominated as extraordinary circumstances) that has been recognized as an alternative basis for a third party to seek custody and visitation of another person's child. Watkins, supra, 163 N.J. at 247-48, 748 A.2d 558; D.T., supra, 200 N.J.Super. at 176, 491 A.2d 7. The "exceptional circumstances" category contemplates the intervention of the Court in the exercise of its parens patriae power to protect a child. Sorentino v. Family & Children's Soc'y of Elizabeth, 72 N.J. 127, 132, 367 A.2d 1168 (1976); Adoption of M., 317 N.J.Super. 531, 541, 722 A.2d 615 (Ch.Div.1998); see also Sider v. Sider, 334 Md. 512, 639 A.2d 1076, 1085 (1994) (stating that presumption of parental fitness can be overcome upon showing of unfitness or exceptional circumstances); Cotton v. Wise, 977 S.W.2d 263, 265 (Mo.1998) (requiring unfitness, abandonment, or extraordinary circumstances before terminating parental rights); Merritt v. Way, 58 N.Y.2d 850, 460 N.Y.S.2d 20, 446 N.E.2d 776, 777 (1983) (stating that surrender, abandonment, unfitness, persistent neglect, or other extraordinary circumstance will result in termination of right to custody).

Subsumed within that category is the subset known as the psychological parent cases in which a third party has stepped in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood. Sorentino, supra, 72 N.J. at 132, 367 A.2d 1168 (acknowledging that before court would remove child from foster home and return to biological parents, hearing was necessary to determine whether child would be

psychologically harmed by the separation from his foster parents); Matter of Adoption of Child by P.S., 315 N.J.Super. 91, 94-95, 716 A.2d 1171 (App.Div.1998) (stating that court must consider whether child bonded and formed psychological relationship with foster parents before custody rights of natural parent could be asserted); Guardianship of J.T., 269 N.J.Super. 172, 190, 634 A.2d 1361 (App.Div.1993) (finding transfer of child from foster mother, who acted as psychological parent, to biological mother was barred because overwhelming evidence existed that psychological harm to child would result); Todd v. Sheridan, 268 N.J.Super. 387, 398, 633 A.2d 1009 (App.Div.1993) (applying best interest standard in custody dispute between four year old's biological father and maternal grandparents, who lived with child and acted as psychological parents); Zack v. Fiebert, 235 N.J.Super. 424, 433, 563 A.2d 58 (App.Div.1989) (establishing that maternal grandparents, who were not psychological parents, needed to prove biological father's unfitness to obtain custody, not simply best interests); D.T., supra, 200 N.J.Super. at 175, 491 A.2d 7 (App.Div.1985) (finding that maternal grandparents, with whom grandchild and biological mother resided, were not entitled to custody of grandchild upon death of biological mother because grandparents failed to demonstrate that they were psychological parents); Hoy v. Willis, 165 N.J.Super. 265, 277, 398 A.2d 109 (App.Div.1978) (finding that best interests of child required that custody of child be granted to maternal aunt with whom child was voluntarily placed by natural mother and with whom child had developed a psychological parent relationship); Guardianship of D., C., E. & A., 169 N.J.Super. 230, 242, 404 A.2d 663 (Camden County Ct.1979) (finding that foster parents, who were child's psychological

parents, were entitled to custody over natural parents who had lacked contact for over four years).

Cases in other jurisdictions have also recognized the psychological parent doctrine. Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (acknowledging that step-parents who stand in loco parentis have ability to petition for visitation); Custody of C.C.R.S., 892 P.2d 246, 247 (Colo. 1995) (holding that best interest test applies to determine custody between biological and psychological parents); Simpson v. Simpson, 586 S.W.2d 33, 35 (Ky.1979) (recognizing that nonparent who stands in loco parentis may petition for custody); E.N.O. v. L.M.M., 429 Mass. 824, 711 N.E.2d 886, 893-94 (1999) (holding that trial court had jurisdiction to award visitation between child and de facto parent); In Matter of J.W.F., 799 P.2d 710, 714 (Utah 1990) ("[T]he fact that a person is not a child's natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned. Certain people, because of their relationship to a child, are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody."); Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 421 (1995) (outlining four prong test for establishing de facto parent relationship).

At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life. Smith v.

Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14, 35 (1977). That point was emphasized in Lehr v. Robertson, 463 U.S. 248, 261, 103 S.Ct. 2985, 2993, 77 L.Ed.2d 614, 626 (1983), where the Supreme Court held that a stepfather's actual relationship with a child was the determining factor when considering the degree of protection that the parent-child link must be afforded. The Court stressed that

> the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship.
>
> [Ibid.]

To be sure, prior cases in New Jersey have arisen in the context of a third party taking over the role of an unwilling, absent or incapacitated parent. The question presented here is different; V.C. did not step into M.J.B.'s shoes, but labored alongside her in their family. However, because we view this issue as falling broadly within the contours we have previously described, and because V.C. invokes the "exceptional circumstances" doctrine based on her claim to be a psychological parent to the twins, she has standing to maintain this action separate and apart from the statute.

Appendix A

IV

The next issue we confront is how a party may establish that he or she has, in fact, become a psychological parent to the child of a fit and involved legal parent. That is a question which many of our sister states have attempted to answer. Some have enacted statutes to address the subject by deconstructing psychological parenthood to its fundamental elements, including: the substantial nature of the relationship between the third party and the child, see, e.g., Ariz.Rev.Stat. Ann. § 25-415(G)(1) (West 2000); whether or not the third party and the child actually lived together, see, e.g., Minn.Stat. Ann. § 257.022(2b) (West 1999); Tex. Fam.Code Ann. § 102.003(a)(9) (West 1999); and whether the unrelated third party had previously provided financial support for the child, see, e.g. 1999 Nev. Stat. 125A.330(3)(I).

Several state courts have attempted to refine the concept further. For example, the Supreme Judicial Court of Massachusetts has recently addressed the issue of granting a person it denominated as a child's de facto parent the right to visitation. E.N.O. v. L.M.M., 429 Mass. 824, 711 N.E.2d 886 (1999). In E.N.O., the court defined a de facto parent as

> one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of care taking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental

> needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.
>
> [Id. at 891 (citation and footnote omitted)].

Additionally, the court noted that a de facto parent performs those functions "for reasons primarily other than financial compensation." Id. at 891 n. 6.

Similarly, in Carter v. Brodrick, 644 P.2d 850 (Alaska 1982), the Alaska Supreme Court defined the nature of the relationship that gives rise to a finding that the third party acted as a psychological parent. The court stated that the psychological parent is

> one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs.
>
> [Id. at 853 n. 2.]

The most thoughtful and inclusive definition of de facto parenthood is the test enunciated in Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 421 (1995), and adopted by the Appellate Division majority here. It addresses the main fears and concerns both legislatures and courts have advanced

when addressing the notion of psychological parenthood. Under that test,

> [t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
>
> [Custody of H.S.H.-K., supra, 533 N.W.2d at 421 (footnote omitted).]

Recapping, the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. We are satisfied that that test provides a good framework for determining psychological parenthood in

cases where the third party has lived for a substantial period with the legal parent and her child.[6]

Prong one is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. Without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status. To avoid that result, in order for a third party to be deemed a psychological parent, the legal parent must have fostered the formation of the parental relationship between the third party and the child. By fostered is meant that the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-a-vis the child that the third party's status would not otherwise warrant. Ordinarily, a relationship based on payment by the legal parent to the third party will not qualify.

The requirement of cooperation by the legal parent is critical because it places control within his or her hands. That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite

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6. Obviously, the notion of consent will have different implications in different factual settings. For example, where a legal parent voluntarily absents herself physically or emotionally from her child or is incapable of performing her parental duties, those circumstances may constitute consent to the parental role of a third party who steps into her shoes relative to the child. As in all psychological parent cases, the outcome in such a case will depend on the full factual complex and the existence of the other factors contained in the test.

a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child.

Two further points concerning the consent requirement need to be clarified. First, a psychological parent-child relationship that is voluntarily created by the legally recognized parent may not be unilaterally terminated after the relationship between the adults ends. Although the intent of the legally recognized parent is critical to the psychological parent analysis, the focus is on that party's intent during the formation and pendency of the parent-child relationship. The reason is that the ending of the relationship between the legal parent and the third party does not end the bond that the legal parent fostered and that actually developed between the child and the psychological parent. Thus, the right of the legal parent

> [does] not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.
>
> [J.A.L. v. E.P.H., 453 Pa.Super. 78, 682 A.2d 1314, 1322 (1996) (footnote omitted).]

In practice, that may mean protecting those relationships despite the later, contrary wishes of the legal parent in order to advance the interests of the child. As long as the legal parent consents to the continuation of the relationship between another adult who is a psychological parent and the

child after the termination of the adult parties' relationship, the courts need not be involved. Only when that consent is withdrawn are courts called on to protect the child's relationship with the psychological parent.

The second issue that needs to be clarified is that participation in the decision to have a child is not a prerequisite to a finding that one has become a psychological parent to the child. We make that point because the trial court appeared to view the fact that M.J.B. alone made the decision to have the twins as pivotal to the question of the existence of a psychological parent relationship between V.C. and the children. Although joint participation in the family's decision to have a child is probative evidence of the legally recognized parent's intentions, not having participated in the decision does not preclude a finding of the third party's psychological parenthood. Such circumstances parallel the situation in which a woman, already pregnant or a mother, becomes involved with or marries a man who is not the biological or adoptive father of the child, but thereafter fully functions in every respect as a father. There is nothing about that scenario that would justify precluding the possibility of denominating that person as a psychological parent. It goes without saying that adoption proceedings in these circumstances would eliminate the need for a psychological parent inquiry altogether and would be preferable to court intervention. However, the failure of the parties to pursue that option is not preclusive of a finding of psychological parenthood where all the other indicia of that status are present.

Concerning the remaining prongs of the H.S.H.-K. test, we accept Wisconsin's formulation with these additional

comments. The third prong, a finding that a third party assumed the obligations of parenthood, is not contingent on financial contributions made by the third party. Financial contribution may be considered but should not be given inordinate weight when determining whether a third party has assumed the obligations of parenthood. Obviously, as we have indicated, the assumption of a parental role is much more complex than mere financial support. It is determined by the nature, quality, and extent of the functions undertaken by the third party and the response of the child to that nurturance.

Indeed, we can conceive of a case in which the third party is the stay-at-home mother or father who undertakes all of the daily domestic and child care activities in a household with preschool children while the legal parent is the breadwinner engaged in her occupation or profession. Although it is always possible to put a price on the contributions of the stay-at-home parent, see Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements, 77 Tex. L.Rev. 17, 43 (1998) (outlining different economic models for placing value on homemaker's contribution), our point is that such an analysis is not necessary because it is the nature of what is done that will determine whether a parent-child bond has developed, not how much it is worth in dollars.

It bears repeating that the fourth prong is most important because it requires the existence of a parent-child bond. A necessary corollary is that the third party must have functioned as a parent for a long enough time that such a

bond has developed. What is crucial here is not the amount of time but the nature of the relationship. How much time is necessary will turn on the facts of each case including an assessment of exactly what functions the putative parent performed, as well as at what period and stage of the child's life and development such actions were taken. Most importantly, a determination will have to be made about the actuality and strength of the parent-child bond. Generally, that will require expert testimony.

The standards to which we have referred will govern all cases in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of a legal parent, with whom the third party has lived in a familial setting.

V

This opinion should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have

been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation. Zack, supra, 235 N.J.Super. at 432, 563 A.2d 58.

VI

Once a third party has been determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent. Ibid. Custody and visitation issues between them are to be determined on a best interests standard giving weight to the factors set forth in N.J.S.A. 9:2-4:

> the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of

> the parents; the geographical proximity of the parents' homes; the extent and quality of time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.

That is not to suggest that a person's status as a legal parent does not play a part in custody or visitation proceedings in those circumstances. Indeed, as the Appellate Division stated in Todd v. Sheridan, 268 N.J.Super. 387, 399, 633 A.2d 1009 (App.Div.1993):

> No fair reading of [Zack] prohibits a judge from considering any aspect of either party's character or status in assessing the best interests of the child. N.J.S.A. 9:2-4. Obviously, as the trial judge recognized, he was not free to give an absolute preference to [the natural parent] because that would have undermined the salutary aims Zack was meant to accomplish. However, he was free to consider [the natural parent's] status as [the child's] biological father as one weight in the best interests balance.

We agree. The legal parent's status is a significant weight in the best interests balance because eventually, in the search for self-knowledge, the child's interest in his or her roots will emerge. Thus, under ordinary circumstances when the evidence concerning the child's best interests (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent.

Visitation, however, will be the presumptive rule, subject to the considerations set forth in N.J.S.A. 9:2-4, as would be the case if two natural parents were in conflict. As we said in Beck v. Beck, 86 N.J. 480, 495, 432 A.2d 63 (1981), visitation rights are almost "invariably" granted to the non-custodial parent. Indeed, "[t]he denial of visitation rights is such an extraordinary proscription that it should be invoked only in those exceptional cases where it clearly and convincingly appears that the granting of visitation will cause physical or emotional harm to the children or where it is demonstrated that the parent is unfit." Barron v. Barron, 184 N.J.Super. 297, 303, 445 A.2d 1182 (Ch.Div.1982); see also, Wilke v. Culp, 196 N.J.Super. 487, 503, 483 A.2d 420 (App.Div.1984) (requiring clear and convincing evidence of exceptional circumstance to warrant denial of visitation). Once the parent-child bond is forged, the rights and duties of the parties should be crafted to reflect that reality.

VII

Ordinarily, when we announce a new standard, we remand the case to the trial court for reconsideration. That is not necessary here. This full record informs us that M.J.B. fostered and cultivated, in every way, the development of a parent-child bond between V.C. and the twins; that they all lived together in the same household as a family; that despite M.J.B.'s after-the-fact characterizations of V.C. as a "stranger" and a "nanny," V.C. assumed many of the day-to-day obligations of parenthood toward the twins, including financial support; and that a bonded relationship developed between V.C. and the twins that is parental in nature. In short, we agree with the Appellate Division that V.C. is a psychological parent to the twins.

That said, the issue is whether V.C. should be granted joint legal custody and visitation. As we have stated, the best interests standard applies and the factors set forth in N.J.S.A. 9:2-4 come into play. Under that statute V.C. and M.J.B. are essentially equal. Each appears to be a fully capable, loving parent committed to the safety and welfare of the twins. Although there is animosity between V.C. and M.J.B., that is not a determinant of whether V.C. can continue in the children's lives.

We note that V.C. is not seeking joint physical custody, but joint legal custody for decision making. However, due to the pendency of this case, V.C. has not been involved in the decision-making for the twins for nearly four years. To interject her into the decisional realm at this point would be unnecessarily disruptive for all involved. We will not, therefore, order joint legal custody in this case.

Visitation, however, is another matter. V.C. and the twins have been visiting during nearly all of the four years since V.C. parted company from M.J.B. Continued visitation in those circumstances is presumed. Nothing suggests that V.C. should be precluded from continuing to see the children on a regular basis. Indeed, it is clear that continued regular visitation is in the twins' best interests because V.C. is their psychological parent. We thus affirm the judgment of the Appellate Division.

VIII

Third parties who live in familial circumstances with a child and his or her legal parent may achieve, with the consent

of the legal parent, a psychological parent status vis-a-vis a child. Fundamental to a finding of the existence of that status is that a parent-child bond has been created. That bond cannot be unilaterally terminated by the legal parent. When there is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child.

Establishing psychological parenthood is not an easy task and the standards we have adopted should be scrupulously applied in order to protect the legal parent-child relationship.

O'HERN, J., concurring.

I concur in the opinion and judgment of the Court. I agree that the degree of intrusion on parental autonomy is properly resolved here by the standard set forth in the Court's opinion. I adhere to the views expressed in my dissenting opinion in Watkins v. Nelson, 163 N.J. 235, 748 A.2d 558 (2000), that the determination of custody following the death of a custodial parent requires a different standard in order to protect a grieving child from being removed from her home before she may be able to bear the twin losses of a parent and the familiar presence of those family members who, until then, had provided her nurture and love.

Appendix A

LONG, J., concurring.[1]

Sociologists who study the family have concluded that, like all social institutions, it has certain attributes or characteristics. Two of those are the stability of the parents' relationship and parental nurturing. Ernest W. Burgess and Harvey J. Locke, The Family: From Institution to Companionship, 651 (1953); Lee E. Teitelbaum, Family History and Family Law 1985 Wis. L.Rev. 1135, 1142-43 (1985). A third characteristic identified by scholars is the family's claim to autonomous privacy. Craig W. Christensen, If Not Marriage? On Securing Gay & Lesbian Family Values by a "Simulacrum of Marriage", 66 Fordham L.Rev. 1699, 1717 (1998). That privacy association spawned the family's "awareness of itself as a precious emotional unit" demanding isolation from outside intrusion. Id. at 1718 (quoting Edward Shorter, The Making of the Modern Family, 227 (1975)). It also resulted in a concept of domestic privacy with an objective meaning; the family not only experienced itself as private, but was recognized as such by society. Teitelbaum, supra, 1985 Wisc. L.Rev. at 1144.

The dominant model of the American family, both emotionally and legally, is the nuclear family — "a social institution with a sort of corporate identity: a collective of husband, wife, and children." Teitelbaum, supra, 1985 Wisc. L.Rev. at 1138. Over time, because of the dominance of the nuclear family in our collective consciousness, the attributes of family life came to be associated with it to the exclusion of any other model:

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1. See Negron v. Llarena, 156 N.J. 296, 716 A.2d 1158 (1998) (reflecting that author of majority opinion is free to add remarks in concurring opinion).

Appendix A

> The stability of the companionate couple and the sustenance of parental nurturing were to become the quintessential American "family values." As a necessary corollary, in aid and protection of the values, came recognition of the family as an autonomous bastion of privacy. Although the nuclear family was merely the perceived repository of these valued characteristics, eventually it came to be viewed by many as though it represented a value on its own right.
>
> [Christensen, supra, 66 Fordham L.Rev. at 1718.]

That is a critical point for we should not be misled into thinking that any particular model of family life is the only one that embodies "family values." Those qualities of family life on which society places a premium — its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion) — are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.

Those attributes may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons. What is required is the creation of "an intimate familial relationship that is stable, enduring, substantial and mutually

supportive, . . . one that is cemented by strong emotional bonds and provides deep and pervasive emotional security." Dunphy v. Gregor, 136 N.J. 99, 115, 642 A.2d 372 (1994).

Generally, such a relationship is built on a commitment by the adults to live as a family, accompanied by the actuality of family life, involving the love, care, nurturance, protection, safety and education of the children in their care. The relationship that develops between children and those who function as their parents, within that setting, ordinarily creates a life-long bond between them.

That bond is not the result of the sexual orientation of the adults or of their marital status. It does not arise solely from biology or legal adoption. Rather, it is borne out of the daily toil parents engage in to keep their children healthy and safe from harm; out of the love and attention provided to the children; and out of the unconditional regard returned by the children to the parental figures. When the bond exists, the parents and the children become a family — an entity greater than the sum of its parts.

What is crucial is to realize that a parent-child bond is not simply a court-bestowed determination for the purpose of resolving litigation. Certainly, it affects the status of custody and visitation litigation, but that is secondary. The finding of the existence of such a bond reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and a child who are not related by blood or adoption. It is different from the bond between great friends or the bond between uncle and nephew, aunt and niece. It is the special connection between a parent and a child.

That there can be such a bond between a child and someone other than the child's legal parent is clear. Mere legality, whether by way of biology or adoption, is not an exclusive determinant of the existence of a parent-child relationship:

> It has been recognized that the psychological aspect of parenthood is more important in terms of the development of the child and its mental and emotional health than the coincidence of biological or natural parenthood.
>
> [Sees v. Baber, 74 N.J. 201, 222, 377 A.2d 628 (1977) (citing Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (1973)).]

See also Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14, 34 (1977) ("[B]iological relationships are not exclusive determination of the existence of a family.").

Moreover, our judicial system has long acknowledged that "courts are capable of dealing with the realities, not simply the legalities, of relationships" and have adjusted the rights and duties of parties in relation to that reality. Dunphy, supra, 136 N.J. at 111, 642 A.2d 372 (recognizing standing of unmarried cohabitant in bystander liability case); see also Crowe v. DeGioia, 90 N.J. 126, 133, 447 A.2d 173 (1982) (recognizing enforceability of support agreement between non-married cohabitants). As the Appellate Division aptly noted: "When social mores change, governing statutes must be interpreted to allow for those changes in a manner that

does not frustrate the purposes behind their enactment." Adoption of Two Children by H.N.R., 285 N.J.Super. 1, 10, 666 A.2d 535 (App.Div.1995) (quoting Adoptions of B.L.V.B. & E.L.V.B., 160 Vt. 368, 628 A.2d 1271, 1275 (1993)). See also J.A.L. v. E.P.H., 453 Pa.Super. 78, 682 A.2d 1314, 1320 (1996) (urging flexibility to adapt to interests of each child given advent of non-traditional families).

In other words, the nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created. The values attached to family life, although properly attributed to the nuclear family model, can exist in other settings, including families created by unmarried persons regardless of their sexual orientation.

In the final analysis it is reality and not mere legality that should dictate who can be denominated as a psychological parent. Once the unique and profound parent-child bond is found to have been forged, the relationship between the psychological parent and the child is, for all intents and purposes, that of parent and child. It is only against that backdrop that the legal notion of psychological parenthood can be fully comprehended.

For affirmance — Chief Justice PORITZ and Justices O'HERN, GARIBALDI, STEIN, COLEMAN, LONG and VERNIERO — 7.

Opposed — None.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED AND DECIDED MARCH 5, 1999

V.C.,

Plaintiff-Appellant,

v.

M.J.B.,

Defendant-Respondent.

Superior Court of New Jersey,
Appellate Division.

Argued Dec. 16, 1998.

Decided March 5, 1999.

* * *

Before Judges STERN, BRAITHWAITE and WECKER.

The judgment of the court was announced in an opinion by

STERN, P.J.A.D.

Plaintiff appeals from a judgment of the Family Part entered on September 18, 1998 which denied her request for joint legal custody of J.B. and J.M.B, "terminated" her visitation with the children and "cease[d] immediately" "all

further contact between the plaintiff and the children of defendant." We denied a stay but accelerated the appeal.

Before us plaintiff V.C. argues that the denial of joint custody and visitation "where it is indisputable that [she] was a psychological parent of J.M.B. and J.B. was reversible error," that the denial of both was "contrary to the children's best interest" and that "the court erred in not finding that it is in the best interest of the children for [her] to be granted parental rights and that [defendant] M.J.B. should be estopped from denying V.C. these rights." For the reasons stated in this opinion and Judge Braithwaite's opinion, we affirm the judgment denying plaintiff's application for joint custody. For the reasons stated in this opinion and the opinion of Judge Wecker, we reverse the order denying her request for visitation.

I.

Plaintiff and defendant are women who maintained a lesbian relationship lasting almost four years. The critical facts were well stated by the trial judge:[1]

> The plaintiff, V.C., and defendant, M.J.B., first met during 1992, and began to date on July 4, 1993. Five days later, on July 9th, M.J.B. began to see fertility doctor, Patricia Hughes, for the purpose of becoming pregnant through artificial insemination. In preparation for this first

1. There were some significant differences and some essential agreement in the testimony of the parties as to the role of V.C. in the various decisions regarding the children and their care.

appointment, M.J.B. had to record her body temperature for eight to nine months prior, so as to enable Dr. Hughes to track her ovulation schedule. Later, in September 1993, V.C. became aware of M.J.B.'s visits to Dr. Hughes and her decision to have a baby via artificial insemination.

As part of the preparation for becoming artificially inseminated, a sperm donor had to be selected. According to V.C., the decision about the sperm donor had been a private one made by herself and M.J.B. However, testimony in court indicated M.J.B. had discussed this decision with almost everyone she came in contact with during the time. Additionally, the testimony portrayed M.J.B. as having been the one to make the final decision about which sperm donor to use.

Between November 1993 and February 1994, M.J.B. went through several Intrauterine Insemination procedures, and, on February 7, 1994, M.J.B. was informed she was pregnant. During M.J.B.'s pregnancy, both M.J.B. and V.C. prepared for the birth of the twins, J.A.B. and J.M.B. The parties moved from M.J.B.'s apartment, where they had been living together since December 1993, into a larger apartment which would be able to accommodate all four of them. V.C. and M.J.B. also prepared wills, powers of attorney, named each other as the beneficiary for their respective life insurance policies and opened a joint checking account for their

household expenses. The parties also decided to have the children call M.J.B. "Mommy" and V.C. "Meema."

V.C. was very involved during M.J.B.'s pregnancy. V.C. attended all Lamaze classes with M.J.B. and was present in the delivery room when the children were born on September 29, 1994. After the children's birth, M.J.B. took three months maternity leave, and V.C. took three weeks vacation time.

The decision about which pediatrician and day care to use were researched and made by M.J.B. but, in each instance, M.J.B. brought V.C. to visit the place she had selected. Also, M.J.B. listed V.C. as the "other mother" on the children's pediatrician and day care registration forms.

In February 1995, V.C. and M.J.B. jointly purchased a house and, later that year, the two were "married" in a commitment ceremony. The children were present at the ceremony and, at the conclusion of the ceremony, V.C., M.J.B. and the children were blessed as a family. At some point, the parties also opened savings accounts for each of the children and named V.C. as the custodian for one account and M.J.B. the custodian for the other. After the children were born, the parties talked about V.C. adopting the children, but were advised to wait until the children were older. In June 1996, the parties went to see an attorney

> regarding V.C. adopting the children. During this meeting, M.J.B. gave the attorney a two thousand dollar retainer and the parties were instructed to get letters from friends and family indicating V.C., M.J.B., and the two children functioned as a family. Neither party actively pursued getting the letters or proceeding with the adoption.
>
> Two months later, in August 1996, M.J.B. ended her relationship with V.C. From August until November 1996, the parties took turns living in the house with the children. By December V.C. had moved out, but spent approximately every other weekend with the children. During this time V.C. contributed money towards the children's expenses. In May 1997, M.J.B. left the children with V.C. for two weeks while M.J.B. was away on business. At some point on or around this time, M.J.B. stopped accepting money from V.C. for the children.
>
> Since the dissolution of the relationship between the parties, both women have become involved with new partners. M.J.B. and the children presently live with M.J.B.'s new partner, and V.C. is currently living with her new partner.

The trial judge also carefully detailed additional testimony of the fact witnesses offered by the respective parties:

> During the trial, V.C. asserted she and M.J.B. had jointly decided to have the children. V.C. testified

she and M.J.B., as a couple, decided which sperm donor to use and later what the children should be named. V.C. presented cards and letters given to her by M.J.B. during their relationship which referred to V.C. as a mother to the children and the four of them as a family. V.C. also testified she and M.J.B. were co-parents and each of them had an equal share of parenting responsibilities. According to V.C., both parties were involved in all aspects of decision-making regarding the children. Also, V.C. testified she and M.J.B. had discussed changing the children's last name to a hyphenated form of both women's names, and planned for V.C. to adopt the children. According to V.C., even after the parties separated, M.J.B. had indicated she was still willing to go forth with the adoption.

V.C.'s mother, [S.D.], corroborated much of V.C.'s testimony. Ms. [D.] testified M.J.B. had told her both parties would be co-parents to the children. According to Ms. [D.], M.J.B. had said she (M.J.B.) and V.C. jointly made the decision to have the children and the children would belong to both parties. Additionally, Ms. [D.] testified M.J.B. and V.C. undertook equal parenting roles and functioned as a family after the children were born. Ms. [D.] also said the children referred to her as "Grandma" and were very attached to V.C.'s family.

[L.M.] also testified on behalf of V.C. Ms. [M.] indicated she had known and worked with M.J.B.

for many years prior to having met V.C. Ms. [M.] testified to having spent time with the parties before, during and after M.J.B.'s pregnancy and the subsequent birth of the children. She remembered having regarded both M.J.B. and V.C. as equal parents to the children while the parties were together. According to Ms. [M.], after the parties separated, M.J.B. told her she (M.J.B.) planned to maintain the relationship between the children and V.C.

[D.B.], who also worked with M.J.B., testified for V.C. According to Ms. [B.], M.J.B. indicated she (M.J.B.) intended to maintain the relationship between the children and V.C. so long as V.C. continued to contribute money toward the children's expenses. Ms. [B.] also remembered having heard V.C. refer to herself as a parent to the children, and maintained she too viewed V.C. as being the children's co-parent.

M.J.B. testified to having encouraged a loving relationship between V.C. and the children, but denied having made the decision to get pregnant with V.C. According to M.J.B., she had planned to be artificially inseminated since the late 1980's, and had already decided to go ahead with it prior to becoming involved with V.C. She acknowledged having talked to V.C. about the sperm donor and the children's names, but said she also talked about those decisions with almost everyone she came in contact with during the time she was making those decisions. M.J.B. was

adamant about having made all final decisions regarding the children.

M.J.B. remembered having thought of the children as theirs (M.J.B.'s and V.C.'s) at times, but at other times thought of the children as hers alone. M.J.B. did acknowledge having thought of the four of them as a family while the relationship was intact. According to M.J.B., V.C. spent a lot of time and assumed a great deal of responsibility with the children, but added V.C. was more her helper than a co-parent. When asked about the potential adoption of the children by V.C., M.J.B. said she had considered it and had consulted an attorney with V.C. about it, but in the end, decided she was not comfortable with V.C. adopting her children. M.J.B. acknowledged the loving relationship the children have with V.C., but also maintained she did not want the children to continue this relationship with V.C. M.J.B. said she, the children and her new partner were a family now.

[A.R.] testified on behalf of M.J.B. Ms. [R.] confirmed M.J.B. had been interested in becoming artificial[ly] inseminated for years prior to having met V.C. Ms. [R.] remembered M.J.B. having decided to proceed with the artificial insemination process prior to the commencement of M.J.B.'s relationship with V.C. Ms. [R.] did not remember whether she had ever heard V.C. refer to herself as a parent to the children, but did acknowledge V.C. having played an important role in the

> children's lives when the parties were together. However, according to Ms. [R.], V.C. would usually only share in the household responsibilities when M.J.B. would ask her to, and not usually upon her own initiative.
>
> [M.I.] also testified on M.J.B.'s behalf. Ms. [I.] testified to having known M.J.B. prior to meeting V.C. She recalled conversations she had had with M.J.B. about M.J.B. becoming pregnant via artificial insemination years before M.J.B. and V.C. became involved. Ms. [I.] did not recall ever having heard V.C. refer to herself as a parent to the twins either before or after their birth, and did not know of M.J.B. having regarded V.C. as a co-parent to the children.

Before reaching his conclusion, the trial judge also set forth the expert testimony admitted into evidence:

> Both parties had expert witnesses testify on their behalf. Dr. Allwyn J. Levine testified on behalf of the plaintiff, and Dr. David Brodzinsky testified for the defense. Both experts came to very similar conclusions after having examined both women and the two children. Each expert examined V.C. and M.J.B. individually and with the children as well as having interviewed the children individually.
>
> After conducting his examination, Dr. Levine concluded both children view V.C. as a maternal

figure and V.C. views the children as her own. Dr. Levine compared the relationship between V.C. and M.J.B. to a heterosexual marriage and said the children would be affected by the loss of V.C. in the same way children would be impacted if denied access to one parent after a divorce. He emphasized the benefit the children received and would continue to receive via the bonded relationship with V.C. Dr. Levine also testified as to the potential impact to the children's self-esteem by feelings of abandonment if they lost V.C. as a maternal figure. However, because the children are only three and a half and have lived apart from V.C. since they were two, Dr. Levine felt, the children would, if necessary, probably recover from the loss of V.C. Dr. Levine also acknowledge[d] the animosity between V.C. and M.J.B. as potentially detrimental to the children, but suggested counseling as a possible solution to improving relations between the parties.

Similarly, Dr. Brodzinsky found a bonded relationship to exist between V.C. and the children, which has been beneficial to the children. During his interviews with the children, they said they regarded V.C. as being a part of their family, which Dr. Brodzinsky said was normal for children of their age to express about a person with whom they have spent such a considerable amount of time. Dr. Brodzinsky felt the children may stop viewing V.C. as being a family member as they get older and learn more

about biological relationships. Dr. Brodzinsky agreed it would be ideal for the children to maintain the bonded relationship with V.C., but feared the children would continue to be caught in the middle given the animosity between the parties. Dr. Brodzinsky agreed with Dr. Levine about the short-term distress the children would probably feel at the loss of V.C., but also felt the children would likely recover without any permanent damage. Dr. Brodzinsky disagreed with Dr. Levine about how the relationship between V.C. and M.J.B. should be viewed. Dr. Brodzinsky felt the loss of V.C. was not comparable to the loss of a parent in a heterosexual divorce because, in a heterosexual relationship, society would reinforce the expectation for a relationship to continue between a child and parent post- divorce, whereas no similar expectation would exist for the relationship between V.C. and the children.

Dr. Levine testified that "because the children were basically parented from birth" by plaintiff and defendant "until they physically separated," the children "see them as inter-changeable maternal mothering objects" and "have established a maternal bond with both of the women." With regard to the animosity between the parties,[2] Dr. Levine

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2. M.J.B. alleges that there is animosity between the parties, and refers to an incident which occurred during the court ordered visitation. Defendant has moved to supplement the record by reference to that event and others. We now deny the motion since the parties will have an opportunity to address the subject on remand.

testified that the party who cannot set aside her anger towards a former spouse or lover should obtain counseling or therapy as opposed to depriving the children of the relationship with a parent. Dr. Brodzinsky indicated that continued animosity between the parties would negatively impact on the children, but also noted that counseling or therapy would help reduce the animosity. Neither expert suggested denying visitation to a parent based on animosity between the parties. Dr. Brodzinsky indicated that "I have seldom worked in a divorce situation where there isn't some ability to reduce animosity." He testified that "[t]he ideal situation is that Miss B is allowed to get on with her life as she wants, but to the extent possible that . . . these children be able at times to have some contact with Miss C who's important to them." His recommendation was "[a]ssuming reasonable relationships between the adults at least reasonably amicable, that [the children] would probably benefit from ongoing contact as they would with any person with whom they have a good solid relationship that can nurture them."

II.

The trial judge denied plaintiff's application for custody, concluding that "while there is evidence in the present case of the plaintiff enjoying a bonded relationship with the children, the plaintiff has failed to establish the relationship to have risen to the level of in loco parentis." He wrote:

> The decision to have the children was clearly the defendant's rather than a joint decision by both parties. At the time V.C. and M.J.B. first began to date, defendant had not only made an

appointment with a doctor to begin the artificial insemination process, but had collected at least eight months worth of information so as to enable the doctor to track her ovulation pattern. Additionally, testimony from the defendant and other witnesses confirmed the medical evidence of the defendant's intention to undergo artificial insemination prior to the beginning of her relationship with the plaintiff.

Both experts testified as to the strong bonded relationship between the plaintiff and the children, but this relationship was not proven to go so far as to establish the plaintiff as a "psychological parent" to the children. Both reports indicate the children view the defendant's new partner as similar to the plaintiff and neither report has either child independently identifying the plaintiff as their mother when asked who their mother is. Given the level of importance surrounding the issue of custody of children, and the lack of definitive evidence, this Court is unwilling to impute a relationship of psychological parent upon the plaintiff. The present case lacks the kind of clear parental relationship between the plaintiff and the children which was present in other cases where a claim of psychological parent was successfully argued. See Matter of the Guardianship of J.C., J.C., J.M.C., Minors, 129 N.J. 1, 608 A.2d 1312 (1992); Hoy v. Willis, 165 N.J.Super. 265, 398 A.2d 109 (App.Div.1978);

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A.S. v. B.S., 139 N.J.Super. 366, 354 A.2d 100 (Ch.Div.1976).

> Because the plaintiff failed to prove she stood in loco parentis and, functioned as a psychological parent to the children, this Court cannot proceed to analyze the present custody case under the best interest test. Absent a showing of plaintiff having acted in loco parentis, the Court would only be able to consider the plaintiff's petition for custody if the plaintiff was able [to] prove the defendant to be an unfit parent. As this has not been alleged, nor is there any evidence to substantiate such a claim, the plaintiff's motion for joint legal custody must be denied.

The trial judge also denied plaintiff the privilege of visitation because an in loco parentis relationship with a stepchild "terminate[s] once the relationship between the adults is ended." Under the test adopted by the Wisconsin Supreme Court in Custody of H.S H.-K., 193 Wis.2d 649, 533 N.W.2d 419 (1995), the trial judge found plaintiff had established a "bonded," but not a "parental," relationship and had not "assumed obligations of parenthood," and concluded, in any event, that because of the "animosity" caused by defendant[3] and the fact that "defendant resents the plaintiff's presence in her life and this attitude is inevitably passed along to the children," visitation is not in

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3. The judge wrote "although the plaintiff maintains she harbors no grudges or animosity for the defendant, the same cannot be said for the defendant towards the plaintiff."

"the best interest" of the children. We disagree with the trial judge's conclusion that this "bonded relationship with the children . . . [does not rise] to the level of in loco parentis."[4] Accordingly, the critical issue to be decided is whether the granting of joint custody or visitation is in the "best interests" of the children. In so deciding, we recognize that here plaintiff seeks neither physical custody nor sole legal custody and that defendant questions plaintiff's entitlement to enjoy any parental rights. In determining the issues before us, we also indicate our view that this is a subject which warrants legislative review and consideration. However, we must resolve the dispute at hand in light of the present statutes and existing case law. We do not write on a clean slate.

III.

N.J.S.A. 9:2-3 provides:

> [w]hen the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgments or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced . . . . (emphasis added.)

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4. For this reason we do not have to address the judge's conclusion that an in loco parentis relationship "terminate[s] once the relationship between the adults is ended." Compare Palermo v. Palermo, 164 N.J.Super. 492, 397 A.2d 349 (App.Div.1978).

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N.J.S.A. 9:2-4 further provides, in part, that:

> [t]he Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.
>
> In any proceeding involving the custody of a minor child, the rights of both parents shall be equal . . . (emphasis added.)

The statute defines "parent," "when not otherwise described by the context," to mean a "natural parent or parent by previous adoption." N.J.S.A. 9:2-13(f). In dealing with similar issues of custody and visitation of artificially inseminated children sought by a former lesbian partner of the natural mother, the California Court of Appeals interpreted its Uniform Parentage Act by stating:

> [E]xpanding the definition of a 'parent' in the manner advocated by the appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and

> resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status. By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.
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> [Nancy S. v. Michele G., 228 Cal.App.3d 831, 841, 279 Cal.Rptr. 212, 219 (Ct.App.1991).]

See also West v. Superior Court, 59 Cal.App. 4th 302, 69 Cal.Rptr.2d 160 (1997) (denying custody and visitation); In re Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419 (denying custody), cert. denied, Knott v. Holtzman, 516 U.S. 975, 116 S.Ct. 475, 133 L.Ed.2d 404 (1995).

In New Jersey we have nevertheless recognized that

> [w]hen social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.

Appendix B

[Adoption of Two Children by H.N.R., 285 N.J.Super. 1, 10, 666 A.2d 535 (App.Div.1995), quoting Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368, 628 A.2d 1271, 1275 (1993).]

Generally a third party who is seeking custody of a child not related to the third party biologically or by adoption must show that the natural or adoptive parent is unfit in order to be awarded custody. Zack v. Fiebert, 235 N.J.Super. 424, 432, 563 A.2d 58 (App.Div.1989); E.T. v. L.P., 185 N.J.Super. 77, 84, 447 A.2d 572 (App.Div.1982). Requiring that a third party show that the natural or adoptive parent is unfit protects the natural or adoptive parent's right to the custody, care and nurturing of their children. Zack v. Fiebert, supra, 235 N.J.Super. at 432, 563 A.2d 58; Matter of D.T., 200 N.J.Super. 171, 175-76, 491 A.2d 7 (App.Div.1985). See also Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982) (recognizing "[t]he fundamental liberty interest of natural parents"). In Zack Judge Long explained:

> [t]here is no single standard applicable in every third party custody case; the standard to be applied depends upon the status of the third party vis a vis the natural parent and the child.
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> . . . Thus, normally, when a third party seeks custody as against a natural parent, the standard should be . . . unfitness. . . .
>
> However, where, as a preliminary matter, the third party is able to show that he or she stands in the

> shoes of a parent to the child and thus in parity with the natural parent, he or she should be accorded the status of a natural parent in determining the standard to be applied to the quest for custody. In such circumstances, the best interests test should apply.
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> [Zack, supra, 235 N.J.Super. at 432, 563 A.2d 58 (citations omitted).]

This two-step approach works well for third party custody and visitation claims. It permits those individuals who do have a true parent-type relationship with a child to show that their continued role in the child's life would be in the best interests of the child.[5]

As Zack notes, "the standard to be applied depends on the status of the third party," and New Jersey courts have granted custody to third parties even when the legal or biological parent was not unfit.

In Hoy v. Willis, 165 N.J.Super. 265, 398 A.2d 109 (App.Div.1978), the foster mother had custody and

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5. The parties both contend that their homosexual status should not affect the test and that this case should be decided as if plaintiff were an unmarried male lover who had a relationship with defendant. However, the parties can find no New Jersey case which deals with the issues involving those circumstances. But see Klipstein v. Zalewski, 230 N.J.Super. 567, 553 A.2d 1384 (Ch.Div.1988) (regarding visitation). See also, e.g., Van v. Zahorik, 227 Mich.App. 90, 575 N.W.2d 566 (1997), appeal granted, 458 Mich. 865, 582 N.W.2d 836 (1998).

functioned as a psychological parent to the child for approximately four years after a voluntary placement, and the expert testified as to the bonded relationship between the child and the foster mother. We therefore held that the best interests test should apply, and the order returning the child to his biological mother was vacated.[6] In Todd v. Sheridan, 268 N.J.Super. 387, 633 A.2d 1009 (App.Div.1993), we also applied a best interests test because the maternal grandparents, who sought custody after the mother's death, were the primary caretakers of the child, were bonded to her and, according to one expert, functioned as the child's psychological parents. We, therefore, reversed the Chancery Division's award of custody to the father. In Palermo v. Palermo, 164 N.J.Super. 492, 497, 397 A.2d 349 (App.Div.1978), where custody was awarded to the child's stepmother, the former wife of the natural father, we noted that New Jersey courts have not "hesitat[ed] to award custody to someone other than a natural parent when the best interests of the child so dictate, even in one case where the natural mother was no longer found to be unfit." See also S. v. H.M., 111 N.J.Super. 553, 270 A.2d 48 (App.Div.1970); S.M. v. S.J., 143 N.J.Super. 379, 363 A.2d 353 (Ch.Div.1976). We similarly conclude that "unfitness" is not the proper test here. Compare Matter of D.T., supra, 200 N.J.Super. at 171, 491 A.2d 7, applying an unfitness standard where the grandparents seeking custody did not allege that they were the child's psychological parents, the child had lived with them for less than one year, and the grandparents could not

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6. The foster mother was a paternal aunt who was given custody after the Division of Youth and Family Services obtained "temporary custody" pursuant to N.J.S.A. 30:4C-12.

show why the father should be deprived of custody. See also E.T. v. L.P., supra, 185 N.J.Super. at 81-84, 447 A.2d 572.

N.J.S.A. 9:2-4 provides in pertinent part:

> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children. A parent shall not be deemed unfit unless the parent['s] conduct has a substantial adverse effect on the child.

We cannot ignore the statute in applying the Zack test. Zack recognizes that a "psychological parent" is different

than any other third party seeking custody and does not need to prove "unfitness" of the natural parent. Zack, supra, 235 N.J.Super. at 432-33, 563 A.2d 58. However, in applying the "best interests" test when a "psychological parent" seeks custody, deference must still be given to the statute's definition of parent and to the statutory policy. The statute refers to "parents," and the "natural bond of blood [as well as] affection," E.T. v. L.P., supra, 185 N.J.Super. at 84, 447 A.2d 572 (quoting In re Mrs. M., 74 N.J.Super. 178, 183, 181 A.2d 14 (App.Div.1962)), is a significant factor in deciding custody, cf. In the Matter of Baby M., 109 N.J. 396, 537 A.2d 1227 (1988). See also Matter of D.T., supra, 200 N.J.Super. at 175, 491 A.2d 7 (which recognized "the strong presumption in favor of the natural parent's right of custody of his or her own child").

Judge Wecker would remand for a new hearing on custody at which the parties would be guided by the "best interests" standard. I disagree. The record, including expert testimony, was fully developed before the trial judge announced the governing standard as he understood it. Neither party suggests she has anything further to offer and neither contends that a guardian ad litem or attorney for the children should have been appointed. See R. 5:8A, 5:8B.

The parties have been through a great deal as a result of this emotional litigation. They do not seek any more hearings on the issue of custody, and (without speculating on what this trial judge might do in light of his prior opinion)[7] I believe the record now warrants the determination that the

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7. I see no reason to remove this judge from the case.

"best interests" of the children require denial of the application for joint custody. Cf. Karins v. City of Atlantic City, 152 N.J. 532, 540-41, 706 A.2d 706 (1998); Bressman v. Gash, 131 N.J. 517, 528-29, 621 A.2d 476 (1993); R. 2:10-5.[8]

Given the fundamental differences between custody and visitation, the statutory definition of "parent" and the factors developed by our statute and case law regarding the issue of custody, we affirm the trial judge's denial of plaintiff's petition for joint legal custody.

IV.

New Jersey does not limit the privilege of visitation to natural or adoptive parents. The Legislature has, by statute, authorized the granting of visitation to others. See N.J.S.A. 9:2-7.1. Independently, visitation has been granted "under general principles of equity." Klipstein v. Zalewski, 230 N.J.Super. 567, 569, 553 A.2d 1384 (Ch.Div.1988). In fact, before us defendant does not assert that visitation (or custody) can only be granted if there is statutory authorization therefor. See, e.g., D.T., supra, (granting visitation to grandparents (before statute authorizing it) even though natural father was given custody).

In Custody of H.S.H-K., 193 Wis.2d 649, 533 N.W.2d 419, 421 (1995), a majority of the Wisconsin Supreme Court

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8. I recognize that our scope of review would be limited if credibility issues were involved and the trial judge made the initial determination of best interests. Rova Farms Resort Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84, 323 A.2d 495 (1974); Matter of D.T., supra, 200 N.J.Super. at 175, 491 A.2d 7.

held that Wisconsin's visitation statute dealing with judgments relating to natural parents was not designed to "be the exclusive means of obtaining court-ordered visitation, or [to] supplant or preempt the court's long recognized equitable power to protect the best interest of a child by ordering visitation under circumstances not included in the statute." The majority concluded that visitation could be awarded "in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." 533 N.W.2d at 421. "To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent," the petitioner was required to "prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation, within a reasonable time after the parent's interference." It is undisputed that defendant has interfered with plaintiff's visitation with the children in this case and that V.C. sought judicial relief expeditiously.

The H.S.H.-K. majority articulated four factors which must be demonstrated to establish a true parent-type relationship, thereby entitling a third party to visitation:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with

> the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
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> [533 N.W.2d at 421 (one footnote omitted and one footnote placed in body).]

We apply the Wisconsin H.S.H.-K. test to evaluate whether visitation should be considered in the best interests of a child when there is no express statutory authorization. That is to say when a "parent-type relationship" exists and it is in the best interests of the child, visitation should be awarded. And in this context the issue of animosity between the parties should be evaluated as in any case involving visitation. Defendant cannot deprive plaintiff or the twins of visitation because of defendant's feelings towards plaintiff. Moreover, supervised visitation or some court-ordered exchange procedure can be developed where necessary.

Even under the trial judge's fact-finding and irrespective of whether defendant planned to have a child before meeting plaintiff, the record reflects that plaintiff was treated as a co-parent by defendant, at least for certain purposes; that

plaintiff, defendant and the twins lived together as a family for about two years; that plaintiff acted as a parent towards the twins and that they bonded with her as a parent. There is no dispute that when the children were born defendant sent plaintiff a card "on the birth of our child" and stating that "[b]eing a family and being mothers together to our children means more to me than you may ever know." Thereafter, the parties and children participated in a "commitment ceremony," and plaintiff was listed as the "other mother" on the day care registration. Even defendant's expert thought plaintiff had become a psychological parent. Under these facts, therefore, plaintiff had a "parent-type relationship" with the children (H.S.H.-K.) and "stood in the shoes of a parent" (Zack) warranting visitation "in the best interests" of the children.

In looking at the best interests of the children, both experts found that they would benefit from continued contact with plaintiff. Both parties spent extensive time with the children from the time of their birth until the separation. Plaintiff was actively involved in caring for the children and formed a bonded relationship with them. The children also bonded with her. Contrary to the trial judge's suggestion, even defendant's expert, Dr. Brodzinsky, testified that plaintiff "has been an important attachment figure" to the twins and answered "absolutely" when asked if it "would be fair to say that she is essentially a psychological parent to them." Subsequent to the separation, plaintiff continued to spend as much time with the children as defendant would allow. The parties' decision to separate and defendant's election to live with another woman cannot be a basis for depriving the children of continued visitation with plaintiff.

V.

We affirm the judgment denying the petition for joint custody. We reverse the judgment denying visitation and remand for further proceedings to establish a visitation schedule within thirty days.[9]

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9. There are various issues which must be addressed on the remand including Dr. Brodzinsky's concern about plaintiff's relations with a person named "Chris."

Appendix B

BRAITHWAITE, J.A.D., concurring in part and dissenting in part.

I agree with Judge Stern that plaintiff should be denied joint legal custody, but respectfully disagree with his reasons for that conclusion and therefore concur with that portion of the judgment. It therefore follows that, for the reasons expressed by Judge Stern, I disagree with Judge Wecker's opinion that this matter should be remanded for a new hearing on custody. I respectfully dissent from that part of the judgment awarding plaintiff visitation with defendant's children, without defendant's consent. Before I proceed any further, I wish to point out that my viewpoint is not influenced by the parties homosexual status. I would reach the same result, on this set of facts, if plaintiff was a male who had a relationship with defendant, but was not the parent of these children.

Applying New Jersey law, I see no basis for reversing the trial court's decision denying joint legal custody of these children to plaintiff. Plaintiff is not a parent, as defined by our statute. See N.J.S.A. 9:2-13(f). Instead, plaintiff is a third party who must prove that she is a psychological parent to these children in order to obtain custody. See Zack v. Fiebert, 235 N.J.Super. 424, 430-33, 563 A.2d 58 (App.Div.1989) (citing Hoy v. Willis, 165 N.J.Super. 265, 277, 398 A.2d 109 (App.Div.1978)).

A psychological parent is someone, other than a natural or adoptive parent, who, when removed from a child, will cause that child severe psychological harm. Hoy, supra, 165 N.J.Super. at 272, 398 A.2d 109. In Hoy a six year old boy

had lived exclusively with his aunt, his foster parent, from the age of one and a half. The evidence established that the aunt was the child's psychological mother and that removing the child from her involved "more than a speculative possibility of harm to [the child]." Id. at 277, 398 A.2d 109. In denying custody to the boy's natural mother, we stated that "the possibility of serious psychological harm to the child may in a case such as this transcend all other considerations." Id. at 272, 398 A.2d 109 (citing Sorentino v. Family & Children's Society, 72 N.J. 127, 132, 367 A.2d 1168 (1976)).

Here, the trial court properly concluded that plaintiff was not a psychological parent. Although plaintiff and these children may have developed a strong loving relationship over a period of two years, the record does not support a conclusion that they will suffer severe psychological harm if plaintiff is not awarded joint legal custody. In that regard, both parties' experts testified that the children will experience some "short-term problems" if their relationship with plaintiff is terminated. As to long term effects, defendant's expert testified that "they will probably not suffer." He based this opinion on the fact that the children are "well cared for" and that well cared for children are resilient. He saw defendant's children "as reasonably resilient children." Plaintiff's expert said as to long term problems: "I don't feel anyone is able to predict." Thus, the only conclusion that this record supports is that the potential for serious psychological harm is, at best, a "speculative possibility." Id. at 277, 398 A.2d 109. I think a great deal more than a "speculative possibility" has to be shown to award joint legal custody to plaintiff.

Moreover, Judge Wecker defines psychological parenthood as "a finding based upon the role the person historically has played in the child's life." With this definition, under the facts presented here, plaintiff would be a psychological parent if her relationship with defendant had ended within two months, or perhaps within even a shorter period of time, of the birth of defendant's children. Such a definition points out the uncertainty, because of the potential for litigation, that would befall children living within a relationship such as the one that existed previously between these parties. Judge Wecker's definition focuses incorrectly on the role of the parental figure to the child rather than on the relationship of the child to the parental figure. The proper focus is whether severe psychological harm to the child will result from removing the parental figure from the child. Hoy, supra, 165 N.J.Super. at 272, 398 A.2d 109. Severe psychological harm to the child must be demonstrated. As I have stated previously, that conclusion is not supported by this record. As such, there exists no basis to interfere with M.J.B.'s rights, as the natural parent of these children, and award joint legal custody to plaintiff.

Further, I am particularly concerned with my colleagues reliance on Adoption of Two Children by H.N.R., 285 N.J.Super. 1, 10, 666 A.2d 535 (App.Div.1995), to expand the statutory definition of "parent." There, the majority of a panel of this court construed the adoption statute to permit the natural mother's same sex partner to adopt the mother's children, with her consent, without terminating the natural mother's parental rights. See N.J.S.A. 9:3-50. The majority opinion "broadly construed" the step-parent exception of N.J.S.A. 9:3-50 to include the mother's same sex partner.

Appendix B

Adoption of Two Children By H.N.R., 285 N.J.Super. at 8-9, 666 A.2d 535. In my view, evaluating changes in social mores and how those changes are to impact our social policy as reflected in our statutes, is more properly addressed by the Legislature as opposed to the courts.

> It is not up to this court to either agree or disagree with the wisdom of the policy judgment this State has made in this regard. If there is to be any change in this regard, it should come from the legislative branch, rather from us.
>
> [Adoption of Two Children by H.N.R., 285 N.J.Super. at 13, 666 A.2d 535 (Wefing, J.A.D., dissenting).]

Because plaintiff does not meet the definition of parent, I concur in the decision to deny plaintiff's application for joint legal custody.

I respectfully dissent from that part of the judgment awarding plaintiff visitation with defendant's children, without defendant's consent. I find no persuasive legal authority to justify granting visitation to plaintiff under these circumstances where the natural parent objects. As noted, supra, plaintiff is not a parent as defined by our statute. N.J.S.A. 9:2-13(f). Moreover, the fact that plaintiff is a parental figure to the children and has "bonded" with them is not a sufficient basis, in my view, to reach the result that the majority reaches here. These are very young children and as defendant's expert noted, "children form bonds with people such as grandparents, babysitters [and] nannies." The

majority's holding, which applies the standards in Custody of H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, cert. denied, Knott v. Holtzman, 516 U.S. 975, 116 S.Ct. 475, 133 L.Ed.2d 404 (1995), would arguably permit former live-in grandparents, babysitters, nannies and others, visitation with the parent's children over the parent's objection. I cannot support such a view.

I am of the view that under these facts and circumstances the natural parent's decision not to consent to plaintiff's visitation ought to be upheld. I am not persuaded that any public policy leads to a different conclusion under the facts and circumstances here. In the absence of an express public policy to the contrary, a parent ought to have the right to decide who maintains a relationship with her children and what is in their best interest. These children are very young. This view recognizes the right of the natural parent, yet still adheres to what is in the best interests of the child. The rights of the natural parent have long been recognized and are a firmly rooted part of our jurisprudence in this area:

> The right of natural parents to the custody of their minor children is one of the basic rights incident to parenthood. "This right, which recognizes the natural bond of blood and affection between parent and child, is unlike a property right. It has been described as akin to a trust reposed in the parent by the State as parens patriae, for the welfare of the infant." In re Mrs. M., 74 N.J.Super. 178, 183-84, 181 A.2d 14 (App.Div.1962). Indeed the right of natural parents to the custody, care and nurturing of their children has risen to the

> stature of a fundamental right and deserves special protection. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982).
>
> [Zack, supra, 235 N.J.Super. at 431, 563 A.2d 58 (citing Matter of D.T., 200 N.J.Super. 171, 175-76, 491 A.2d 7 (App.Div.1985)) (other citations omitted).]

Further, I am persuaded, as was the trial court, that the animosity between plaintiff and defendant warranted the termination of plaintiff's relationship to defendant's children. N.J.S.A. 9:2-7.1[10] sets forth factors that the court shall consider in ordering visitation for grandparents and siblings, including: "the relationship between each of the child's parents . . . and the applicant." N.J.S.A. 9:2-7.1b(2). The purpose of this factor is "that it is not in the best interest of the child to force the child into the midst of a conflict between the parents and the grandparents." Thompson v. Vanaman, 212 N.J.Super. 596, 598, 515 A.2d 1254 (App.Div.1986) (citing Mimkon v. Ford, 66 N.J. 426, 430, 332 A.2d 199 (1975)).

One could argue that when natural parents experience animosity toward each other, courts do not terminate the non-custodial parent's right to visitation and therefore we should not do so in this circumstance. The difference here, however, is expressed in the public policy of our State that affords visitation rights to parents. See N.J.S.A. 9:2-4. I am

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10. This statute permits grandparents and siblings to make application before the Superior Court for visitation.

not persuaded that any similar public policy, as expressed by our Legislature or case law, exists for the circumstances presented here. In my view it would be up to our State Legislature to address the factual circumstance presented by this appeal.

I note further that N.J.S.A. 9:2-7.1 is contrary to the common law as it pertains to the rights of grandparents and siblings to visitation. Mimkon v. Ford, supra, 66 N.J. at 431, 332 A.2d 199. If a statute is needed to grant visitation to grandparents and siblings, then I think similar statutory authority has to exist to support the position that plaintiff asserts here. In addition, the law cited by the majority to support visitation by plaintiff is not persuasive. The facts and circumstances of those cases are not easily applied here by way of analogy.

Finally, in Nancy S. v. Michele G., 228 Cal.App.3d 831, 279 Cal.Rptr. 212 (Ct.App.1991), the California Court of Appeals, in denying a woman visitation with the children of her former partner, said:

> [E]xpanding the definition of a "parent" in the manner advocated by the appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive

> factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status. By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.
>
> [Id. at 841, 279 Cal.Rptr. at 219.]

I think this language is compelling. Applying the factors set forth by the Wisconsin Supreme Court, as the majority does here, undermines the rights of all natural and adoptive parents and leads to more litigation concerning the rights of individuals claiming to be parents. This is an issue for our Legislature and not our courts.

I would therefore affirm the decision of the trial court.

Appendix B

WECKER, J.A.D., concurring in part; dissenting in part.

I concur in the opinion of Judge Stern with respect to visitation. I agree completely with Judge Stern that "the critical issue to be decided is whether the granting of joint custody or visitation is in the 'best interests' of the children." However, I dissent from the decision reached by Judges Stern and Braithwaite, albeit on entirely different grounds, to affirm the denial of joint legal custody.

My disagreement with Judge Stern in regard to the custody issue in this case is narrow. He would affirm the denial of joint custody, apparently applying the best interests standard to the trial record, and citing only the biological relationship of M.J.B. with the children as the basis for affirming rejection of joint custody. I agree that the biological relationship is a factor to be considered in making a custody determination, particularly if each party seeks sole custody. However, biology warrants considerably less weight when joint custody is sought by one who is, as Judge Stern and I agree, the other psychological parent to the children. The controlling best interest standard has never been applied to the facts in this case, because the trial judge concluded, contrary to the overwhelming weight of the evidence, that V.C. was not a psychological parent. The judge therefore obviously did not consider custody or visitation under a best interests analysis.

Based on the record and the undisputed facts, it is plain to me, as it is to Judge Stern, that visitation with V.C. is in the best interests of the children. A remand is required to determine a specific visitation plan. By contrast, I cannot

find on this record that joint custody is or is not in the best interests of these children. That is a decision best left to the Family Part in the first instance. I therefore would remand the matter for reconsideration of custody under a best interest analysis. While I recognize the downside of postponing finality, I am confident that it can be accomplished quickly if given priority, and that it is a critical step in determining the future relationship between these children and their "other mother."

In order to consider whether the trial court erred in terminating the relationship between V.C. and the children, that is, whether visitation or joint custody was improperly denied, we first must decide what standard applies. In reaching the decision that the best interests of the child must drive both visitation and custody disputes between a biological parent and another bonded, psychological parent, I begin, as do my colleagues, by examining the relevant statutes. N.J.S.A. 9:2-3 provides:

> [w]hen the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgments or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced. . . . (emphasis added.)

N.J.S.A. 9:2-4 further provides, in part, that:

> [t]he Legislature finds and declares that it is in the public policy of this State to assure minor

> children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.
>
> In any proceeding involving the custody of a minor child, the rights of both parents shall be equal . . . . (emphasis added.)

I find the statutory definition of "parent" set forth in N.J.S.A. 9:2-13(f) to be significant: "The word 'parent,' when not otherwise described by the context, means a natural parent or parent by previous adoption." N.J.S.A. 9:2-13(f) (emphasis added). The Legislature did not foreclose the possibility that a person other than a "natural parent or parent by previous adoption" might come within the class of persons referred to as "parents" in N.J.S.A. 9:2-3 and 9:2-4, depending upon "the context." That definition evidences flexibility, not rigidity, consistent with the various family relationships existing in our society today. More significantly, it is consistent with the family established by these parties, who entered into what each described as a committed relationship, unquestionably intending to raise these children together. I can imagine few circumstances in which a person other than a "natural parent or parent by previous adoption" is better "described by the context" than V.C.

The facts here plainly evidence defendant's recognition of plaintiff as the children's "other mother," at least during the first two-and-one-half years of the children's lives. The

parties' commitment ceremony was as close to a marriage ceremony as it could be under law. It was sanctioned by a priest who was recognized by both parties. M.J.B. chose V.C. to be the children's "other mother," and expressed her feelings about V.C.'s role as a co-parent on numerous occasions. The parties and the children attended numerous family and social events together as a family, including functions at Lambda Families, an organization for gay and lesbian families. In addition, the children had a close relationship with V.C.'s extended family. V.C's brother is J.M.B.'s godfather; the children called V.C.'s mother "grandma," and they are also close to V.C.'s grandmother and siblings.

The trial judge erred, in my view, by posing the wrong question with respect to M.J.B.'s intent in conceiving these children. He cited M.J.B.'s medical consultation and preparation for artificial insemination before entering a relationship with V.C., and her discussions with others about the choice of a sperm donor, in support of his conclusion that "[t]he decision to have the children was clearly the defendant's rather than a joint decision by both parties." The relevant question, it seems to me, is not whether M.J.B. would have gone forward with insemination without V.C., but whether she in fact did so fully intending that they would jointly parent the child[ren] of this conception. The record unambiguously establishes that the answer to that question is "yes."

From the point of view of the children and the parties, V.C. is no third party interloper. Even measured by the trial judge's recitation of the facts, plaintiff's relationship with

the children was functionally and psychologically that of a parent.

Moreover, the evidence was undisputed that V.C. undertook the financial responsibilities of a parent to these children. While the parties maintained their relationship, each executed a will naming the other as beneficiary, and each named the children as contingent beneficiaries. V.C. originally named the children as contingent beneficiaries on her pension and life insurance, with M.J.B. as primary beneficiary. After the parties separated, V.C. made the children her primary beneficiaries. The parties contributed to savings accounts for each child, and each of the parties served as a custodian. In addition, V.C. voluntarily paid child support to M.J.B. after the separation, which M.J.B. accepted for a time, apparently until she decided to cut off V.C.'s relationship with the children. By denying the non-biological mother any legal recognition, the court has also denied the children the financial support of a second parent, as well as the security of having another parent who could maintain stability and continuity in their lives in the event of M.J.B.'s premature death or incapacity.

I disagree with Judge Braithwaite's reliance upon what he describes as a literal interpretation of the statute defining "parent," and his view that allowing either visitation or custody as sought here by V.C. would constitute a radical departure from current law. Without disavowing Zack, Judge Braithwaite justifies the denial of both custody and visitation on a finding that "the trial court properly concluded that plaintiff was not a psychological parent." He reaches that conclusion by defining "psychological parent" as one whose

removal from the child's life "will cause that child severe psychological harm," citing Hoy v. Willis, 165 N.J.Super. 265, 272, 398 A.2d 109 (App.Div.1978), without addressing the evidence that Judge Stern and I each have cited to conclude that V.C. is a psychological parent. Psychological parenthood is a finding based upon the role the person historically has played in the child's life. Neither optimistic nor pessimistic predictions of future harm that would result from ending that role can logically define the role itself.

Judge Braithwaite would recognize no legal status whatsoever in V.C.'s relationship to the children absent express legislation. In my view, granting V.C. visitation and remanding for reconsideration of custody would effect a reasonable application of existing statutes and common law to reality; families today take many forms, and we must protect all relationships between parents and children.

While it would be appropriate for the Legislature to address the issues raised by this case, these children cannot wait. It is the function of the courts to address those interstitial areas where no statute literally controls. See, e.g., In re Adoption of B. by E. and R., 152 N.J.Super. 546, 555, 378 A.2d 90 (Co.Ct.1977) (in light of the birth father's objection, Judge (now Justice) Coleman denied adoption but awarded custody to grandparents who "[stood] as psychological parents to B. in every sense of the term.)" My opinion is informed, as is Judge Stern's, by the decision and reasoning of the majority in Adoption of Two Children by H.N.R., 285 N.J.Super. 1, 10, 666 A.2d 535 (App.Div.1995), quoting Adoptions of B.L.V.B. and E.L.V.B., 160 Vt. 368,

628 A.2d 1271, 1275 (1993),[11] and construing the adoption statute to permit a biological mother's same sex partner to adopt.

When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.

My view is consistent, as is Judge Stern's, with Zack v. Fiebert, 235 N.J.Super. 424, 432, 563 A.2d 58 (App.Div.1989), where Judge Long wrote for this court:

> [T]here is no single standard applicable in every third party custody case; the standard to be applied depends upon the status of the third party vis a vis the natural parent and the child.
>
> . . . .
>
> [W]here, as a preliminary matter, the third party is able to show that he or she stands in the shoes

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11. I note, however, that the Supreme Court of Vermont later declined on facts similar to those before us to exercise its equitable jurisdiction to order visitation, finding neither statutory nor common law grounds for jurisdiction. Titchenal v. Dexter, 166 Vt. 373, 693 A.2d 682 (1997) (citing a recently enacted Vermont statute providing for adoption by the same-sex partner of a biological parent, and establishing jurisdiction to decide custody or visitation disputes when the adults' relationship breaks up. Id. 693 A.2d at 687.)

> of a parent to the child and thus in parity with the natural parent, he or she should be accorded the status of a natural parent in determining the standard to be applied to the quest for custody. In such circumstances, the best interests test should apply.
>
> [(emphasis added) (citations omitted).]

See also J.A.L. v. E.P.H., 453 Pa.Super. 78, 682 A.2d 1314, 1319 (1996):

> Biological parents have a prima facie right to custody, but biological parenthood is not the only source of such a right. Cognizable rights to seek full or partial custody may also arise under statutes . . . permitting grandparents and great-grandparents to seek visitation or partial custody of their grandchildren or great grandchildren or by virtue of the parties' conduct, as in cases where a third party who has stood in loco parentis has been recognized as possessing a prima facie right sufficient to grant standing to litigate questions of custody of the child for whom he or she has cared. See, e.g., Rosado v. Diaz, 425 Pa.Super. 155, 624 A.2d 193 (1993); Karner v. McMahon, 433 Pa.Super. 290, 640 A.2d 926 (1994).

In Zack we recognized that someone who stands in the shoes of a parent, that is, one who has effectively become a psychological parent, is different than any other third party seeking custody, and that such a parent therefore need not

prove that the so-called natural parent is unfit. Zack, supra, 235 N.J.Super. at 432-33, 563 A.2d 58. However, the record contained insufficient proof that the grandparents who sought custody had become psychological parents to the child, and "the standard to be applied depends on the status of the third party. . . ." The best interest test was therefore inappropriate.

One commentator has recommended "expanding the definition of parent to include those persons who have established a parental relationship with the child," while preserving "the natural parent preference, but only to the extent that it is consistent with the child's best interest." Janet Leach Richards, The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent, 16 Nova L.Rev. 733, 735 (1992). Richards would extend the natural parent preference to a third party who had acted as a parent, such as V.C., and in a custody dispute between such a person and a natural parent, as here, the standard simply "would be the best interest of the child." Id.

As Judge Stern notes, there is ample precedent for granting custody to a psychological parent where that is in the best interest of the child. See Hoy v. Willis, 165 N.J.Super. 265, 398 A.2d 109 (App.Div.1978) (foster mother functioned as a psychological parent and had a bonded relationship with the child). In Hoy we recognized more than twenty years ago,

> Courts have traditionally been reluctant to deny a parent custody of his or her child. However, when the best interests of the child will clearly be served by a custody award to a third party, a

> finding of either parental unfitness or abandonment is not a prerequisite to the entry of an order doing so.
>
> . . . .
>
> That there can be a psychological parent-child relationship between a child and someone other than the child's biological parent is well recognized in the literature on the subject. Biological relationships are not an exclusive determinate of the existence of a family.
>
> [Id. 165 N.J.Super. at 272, 398 A.2d 109. (citations omitted).]

See also Todd v. Sheridan, 268 N.J.Super. 387, 633 A.2d 1009 (App.Div.1993) (reversing custody award to father, and ordering a best interests test to consider maternal grandparents' custody claim as the child's psychological parents and primary caretakers). Palermo v. Palermo, 164 N.J.Super. 492, 497, 397 A.2d 349 (App.Div.1978) (custody awarded to child's stepmother over the natural father); S.M. v. S.J., 143 N.J.Super. 379, 363 A.2d 353 (Ch.Div.1976). I agree entirely with Judge Stern that "unfitness" is not the proper test here. In applying the best interest test to a psychological parent's application for custody, I would follow the guidance of N.J.S.A. 9:2-4, considering the non-exclusive factors set forth in that statute, and recognizing the "status as biological [parent] as one weight in the best interests balance." Todd v. Sheridan, supra, 268 N.J.Super. at 399, 633 A.2d 1009.

Appendix B

Judge Braithwaite relies in part upon a decision of one intermediate appellate court in California. Nancy S. v. Michele G., 228 Cal.App.3d 831, 279 Cal.Rptr. 212 (1991) (denying custody and visitation on similar facts). After describing the parties' joint decision to parent two children, and the post-separation shared custody arrangements, that court "agree[d] with appellant that the absence of any legal formalization of her relationship to the children [i.e., adoption] has resulted in a tragic situation." Id., 228 Cal.App.3d at 841, 279 Cal.Rptr. at 219 (emphasis added). However, the California court felt bound to a narrow statutory definition of parent "as one who is the natural or adoptive parent of a child." Id., 228 Cal.App.3d at 835, 279 Cal.Rptr. at 215.[12]

> [E]xpanding the definition of a 'parent' in the manner advocated by the appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the

12. For a detailed discussion of the issues raised by the California case, see Elizabeth A. Delaney, Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child, 43 Hastings L.J. 177 (1991).

> course of conduct of the party claiming parental status. By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.
>
> [Id. 228 Cal.App.3d at 841, 279 Cal.Rptr. at 219.]

Our own statute is broader, as noted above, and in any event does not require judicial inaction in the face of a perceived "tragic situation." I do not share the fear of a "slippery slope" as expressed by the California court and Judge Braithwaite. Family courts make decisions that "turn on elusive factual determinations" of intent and perceptions every day. Moreover, concern that to allow V.C. visitation will subject other parents to intrusive applications for visitation by "former live-in grandparents, babysitters, nannies and others" represents an understandable but unwarranted fear. Writing for a Pennsylvania appellate court, Judge Beck has said it well:

> The in loco parentis basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and

> autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.
>
> [J.A.L. v. E.P.H., supra, 682 A.2d at 1319-20.]

Parental autonomy over child-rearing is a significant value that has long been recognized by society and the courts. See, e.g., John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 Wash. & Lee L.Rev. 351, 382-402 (1998) (criticizing the best interests test, even in the limited context of visitation); Mark Strasser, Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child, 45 U. Kan. L.Rev. 49, 50 (1996). The apparent tension between parental autonomy and so-called third-party claims to custody and visitation does not justify ignoring the bonds a child forms with a psychological parent. I am convinced that we can serve the interests of children in non-traditional families such as this, while nevertheless protecting legitimate parental concerns for autonomy. See e.g., Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other

Appendix B

Nontraditional Families, 78 Geo. L.J. 459, 464, 490, 501-07, 513-16, 574-75 (1990).

Suffice it to say that the facts apparent in the record before us, with respect to this plaintiff's relationship with these children, could not be established by the average babysitter, nanny, or grandparent (including even most "live-in" grandparents). Those few persons who can prove a relationship similar to that of V.C. with these children should be properly recognized. Indeed, our ability to distinguish between those who truly stand in the shoes of a parent and others who play significant but not parental roles in a child's life, is best evidenced by this court's decision in Zack. While recognizing the best interest standard for adjudicating custody and visitation disputes involving persons who stand in loco parentis, the court in Zack concluded that the evidence concerning those grandparents' close relationship with the children nevertheless did not place them in the shoes of a parent.

This is not the first time a court has had to address these difficult issues. See Nicole Berner, Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations, 10 Berkeley Women's L.J. 31, 32 (1995) (citing an American Bar Association estimate that between six and ten million children in the United States are being raised by gay or lesbian parents.) And certainly it is not the last. As our society and cultures evolve, along with our concepts of family, courts will undoubtedly face other situations in which the parties to a non-traditional parenting arrangement, each of whom is directly involved with the care and nurturing of a child, come to a parting of the ways and fail to agree on the best means

of parenting. Such failures will continue to bring courts into the picture, allowing and requiring true strangers to determine what is in the best interest of the child.

The availability of artificial insemination (including known, unknown, and combined sperm donors), in vitro fertilization (including egg donation), and other means of reproduction, may further cloud the definition of biological parenthood. See Craig W. Christensen, If Not Marriage? On Securing Gay and Lesbian Family Values By A "Simulacrum of Marriage," 66 Fordham L.Rev. 1699, 1760-62 (1998). Indeed, psychological parenting takes on more and more importance under these circumstances. Would we view this case differently if V.C. had donated the eggs for in vitro fertilization, and the fertilized embryo had been implanted in M.J.B.'s uterus? What if two men, intending to jointly parent their child, each donated sperm to be mixed together and used to artificially inseminate a woman willing to carry the child for them? And then there are the rare switched-baby cases. Bright-line rules that are appropriate to financial and commercial disputes are less helpful in resolving such relationship issues. See, e.g., Strasser, supra, 45 U. Kan. L.Rev. at 109-10.[13] In the matter before us, I can find no better guiding principle than the best interest of the child.

Others have adopted that principle, at least in the context of visitation disputes. In Holtzman v. Knott, 193 Wis.2d 649,

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13. There is, in my view, a pressing need for professionals in many disciplines, including law, child psychology, and medical ethics, to consider these circumstances, and for the legislature to consider the informed views of such persons whenever it addresses custody and visitation of children.

533 N.W.2d 419, 421, cert. denied, 516 U.S. 975, 116 S.Ct. 475, 133 L.Ed.2d 404 (1995), discussed at length by Judge Stern, the Wisconsin Supreme Court set forth a workable standard for addressing visitation disputes after the break-up of a relationship between the adults. That Court affirmed without discussion the trial court's order dismissing the plaintiff's petition for custody, on the basis of the Wisconsin custody statute, holding that the plaintiff had "not raised a triable issue regarding [defendant's] fitness or ability to parent her child and has not shown compelling circumstances requiring a change of custody." Id. 533 N.W.2d at 420, citing Wis. Stat. § 767.24(3). The majority adopted a more liberal standard for visitation. Concurring in Holtzman, Justice Bablitch eloquently addressed the same concerns I have here:

> My focus is on the completely innocent victim in this case, and the thousands of others like him: the children of dissolving non-traditional relationships. The issue is the best interests of these children, and the role of the court in protecting them.
>
> The dissents totally ignore the access (i.e. visitation) interests of the one undisputable victim in this case, the child. Having been victimized by the dissolving relationship of the two people who raised him, the dissents would victimize the child once more by denying him any relationship with one of the two people he has come to love and cherish. It is through no fault of this child that he finds himself where he is today. Yet the dissents, two of which accuse the majority of legislating a

> result, themselves legislate the courts right out of any role in protecting access rights for children of dissolving non-traditional families.
>
> [533 N.W.2d at 437-38.]

In a visitation dispute between lesbian parents with a history remarkably similar to the case before us, but where custody was not sought, Judge (now Chief Judge) Kaye of the New York Court of Appeals dissented from "[t]he Court's decision, fixing biology as the key to visitation rights. . . ." In re Alison D. v. Virginia M., 77 N.Y.2d 651, 657-58, 572 N.E.2d 27, 30, 569 N.Y.S.2d 586, 589 (1991):

> [T]he impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority's retreat from the courts' proper role — its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children's interests into account — compels this dissent.

The reasoning of Justice Bablitch and Judge Kaye applies equally to custody disputes where a psychological parent is involved.

I am satisfied that the record of V.C.'s relationship with the children requires visitation, whereas that relationship does not necessarily point to joint custody. In regard to custody, I would hold simply that where a person proves a

bonded parental relationship with a child,[14] a best interest analysis must form the basis for a custody determination. That has not happened in this case.

I would therefore reverse the judgment denying joint custody and visitation, and barring V.C. from all contact with the children. I would remand to the Family Part not only to establish a visitation plan, but also to determine V.C.'s application for joint custody under a best interests analysis. I would instruct the Presiding Judge of the Family Part to assign another judge to the matter on remand, in order to insure a fresh evaluation under the correct legal standard. I would instruct the judge on remand to begin with the existing record, and leave to the judge's discretion how much additional lay or expert testimony would be helpful to the court, and whether to appoint a guardian ad litem or attorney to represent the interests of the children with respect to custody, as permitted by N.J.S.A. 9:2-4c "for good cause and upon [the court's] own motion. . . ."

Because I am concerned that V.C. has been barred from all contact with the children since the Family Part's decision in June 1998, I would direct the designated Family Part Judge to establish a visitation schedule within thirty days, to conclude the custody hearings within 90 days, and to give this entire matter the highest possible priority. Time does not stand still for children while the parties and the courts pursue litigation.

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14. The terms variously employed by courts and commentators include psychological parent, in loco parentis, de facto parenthood, equitable parent or functional parent, among others.

APPENDIX C — OPINION AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FAMILY PART, ESSEX COUNTY DATED AND DECIDED SEPTEMBER 18, 1998

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
ESSEX VICINAGE

CHAMBERS OF
PHILIP B. CUMMIS
JUDGE

GIBRALTAR BUILDING
212 WASHINGTON STREET
NEWARK, NEW JERSEY 07102

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
FAMILY PART
ESSEX COUNTY

DOCKET NO. FD-07-875-98

Civil Action

V.C.,

Plaintiff,

v.

M. J. B.,

Defendant.

Appendix C

OPINION AND ORDER

Decided: September 18, 1998

* * *

PHILIP B. CUMMIS, J.S.C.

I. CASE HISTORY

The case before the Court today involves plaintiff's petition for visitation and joint custody of twins born to the defendant during a lesbian relationship between plaintiff and defendant.

The plaintiff, V.C., and defendant, M.J.B., first met during 1992, and began to date on July 4, 1993. Five days later, on July 9th, M.J.B. began to see fertility doctor, Patricia Hughes, for the purpose of becoming pregnant through artificial insemination. In preparation for this first appointment, M.J.B. had to record her body temperature for eight to nine months prior, so as to enable Dr. Hughes to track her ovulation schedule. Later, in September 1993, V.C. became aware of M.J.B.'s visits to Dr. Hughes and her decision to have a baby via artificial insemination.

As part of the preparation for becoming artificially inseminated, a sperm donor had to be selected. According to V.C., the decision about the sperm donor had been a private one made by herself and M.J.B. However, testimony in court indicated M.J.B. had discussed this decision with almost everyone she came in contact with during the time.

Additionally, the testimony portrayed M.J.B. as having been the one to make the final decision about which sperm donor to use.

Between November 1993 and February 1994, M.J.B. went through several Intrauterine Insemination procedures, and, on February 7, 1994, M.J.B. was informed she was pregnant. During M.J.B.'s pregnancy, both M.J.B. and V.C. prepared for the birth of the twins, J.A.B. and J.M.B. The parties moved from M.J.B.'s apartment, where they had been living together since December 1993, into a larger apartment which would be able to accommodate all four of them. V.C. and M.J.B. also prepared wills, powers of attorney, named each other as the beneficiary for their respective life insurance policies and opened a joint checking account for their household expenses. The parties also decided to have the children call M.J.B. "Mommy" and V.C. "Meema."

V.C. was very involved during M.J.B.'s pregnancy. V.C. attended all Lamaze classes with M.J.B. and was present in the delivery room when the children were born on September 29, 1994. After the children's birth, M.J.B. took three months maternity leave, and V.C. took three weeks vacation time.

The decision about which pediatrician and day care to use were researched and made by M.J.B. but, in each instance, M.J.B. brought V.C. to visit the place she had selected. Also, M.J.B. listed V.C. as the "other mother" on the children's pediatrician and day care registration forms.

In February 1995, V.C. and M.J.B. jointly purchased a house and, later that year, the two were "married" in a

commitment ceremony. The children were present at the ceremony and, at the conclusion of the ceremony, V.C., M.J.B. and the children were blessed as a family. At some point, the parties also opened savings accounts for each of the children and named V.C. as the custodian for one account and M.J.B. the custodian for the other. After the children were born, the parties talked about V.C. adopting the children, but were advised to wait until the children were older. In June 1996, the parties went to see an attorney regarding V.C. adopting the children. During this meeting, M.J.B. gave the attorney a two thousand dollar retainer and the parties were instructed to get letters from friends and family indicating V.C., M.J.B., and the two children functioned as a family. Neither party actively pursued getting the letters or proceeding with the adoption.

Two months later, in August 1996, M.J.B. ended her relationship with V.C.. From August until November 1996, the parties took turns living in the house with the children. By December V.C. had moved out, but spent approximately every other weekend with the children. During this time V.C. contributed money towards the children's expenses. In May 1997, M.J.B. left the children with V.C. for two weeks while M.J.B. was away on business. At some point on or around this time, M.J.B. stopped accepting money from V.C. for the children.

Since the dissolution of the relationship between the parties, both women have become involved with new partners. M.J.B. and the children presently live with M.J.B.'s new partner, and V.C. is currently living with her new partner.

Appendix C

V.C. filed for joint custody and visitation rights for the children in July 1997 because she feared M.J.B. wanted to sever all ties between her and the children. Since then, this Court has granted V.C. visitation time with the children every other Saturday, first for a five hour period, and later, extended the visits to eight hours.

The extent to which V.C. was a co-parent to the children, as opposed to a nanny type role, while the parties were living together, was heavily disputed during the trial.

During the trial, V.C. asserted she and M.J.B. had jointly decided to have the children. V.C. testified she and M.J.B., as a couple, decided which sperm donor to use and later what the children should be named. V.C. presented cards and letters given to her by M.J.B. during their relationship which referred to V.C. as a mother to the children and the four of them as a family. V.C. also testified she and M.J.B. were co-parents and each of them had an equal share of parenting responsibilities. According to V.C., both parties were involved in all aspects of decision-making regarding the children. Also, V.C. testified she and M.J.B. had discussed changing the children's last name to a hyphenated form of both women's names, and planned for V.C. to adopt the children. According to V.C., even after the parties separated, M.J.B. had indicated she was still willing to go forth with the adoption.

V.C.'s mother, Susan DeLorenzo, corroborated much of V.C.'s testimony. Ms. DeLorenzo testified M.J.B. had told her both parties would be co-parents to the children. According to Ms. DeLorenzo, M.J.B. had said she (M.J.B.)

and V.C. jointly made the decision to have the children and the children would belong to both parties. Additionally, Ms. DeLorenzo testified M.J.B. and V.C. undertook equal parenting roles and functioned as a family after the children were born. Ms. DeLorenzo also said the children referred to her as "Grandma" and were very attached to V.C.'s family.

Linda Mayo also testified on behalf of V.C.. Ms. Mayo indicated she had known and worked with M.J.B. for many years prior to having met V.C.. Ms. Mayo testified to having spent time with the parties before, during and after M.J.B.'s pregnancy and the subsequent birth of the children. She remembered having regarded both M.J.B. and V.C. as equal parent to the children while the parties were together. According to Ms. Mayo, after the parties separated, M.J.B. told her she (M.J.B.) planned to maintain the relationship between the children and V.C..

Denise Bradeen, who also worked with M.J.B., testified for V.C.. According to Ms. Bradeen, M.J.B. indicated she (M.J.B.) intended to maintain the relationship between the children and V.C. so long as V.C. continued to contribute money toward the children's expenses. Ms. Bradeen also remembered having heard V.C. refer to herself as a parent to the children, and maintained she too viewed V.C. as being the children's co-parent.

M.J.B. testified to having encouraged a loving relationship between V.C. and the children, but denied having made the decision to get pregnant with V.C.. According to M.J.B., she had planned to be artificially inseminated since the late 1980's, and had already decided to go ahead with it

prior to becoming involved with V.C.. She acknowledged having talked to V.C. about the sperm donor and the children's names, but said she also talked about those decisions with almost everyone she came in contact with during the time she was making those decisions. M.J.B. was adamant about having made all final decisions regarding the children.

M.J.B. remembered having thought of the children as theirs (M.J.B.'s and V.C.'s) at times, but at other times thought of the children as hers alone. M.J.B. did acknowledge having thought of the four of them as a family while the relationship was intact. According to M.J.B., V.C. spent a lot of time and assumed a great deal of responsibility with the children, but added V.C. was more her helper than a co-parent. When asked about the potential adoption of the children by V.C., M.J.B. said she had considered it and had consulted an attorney with V.C. about it, but in the end, decided she was not comfortable with V.C. adopting her children. M.J.B. acknowledged the loving relationship the children have with V.C., but also maintained she did not want the children to continue this relationship with V.C.. M.J.B. said she, the children and her new partner were a family now.

Adrienne Relyea testified on behalf of M.J.B. Ms. Relyea confirmed M.J.B. had been interested in becoming artificial inseminated for years prior to having met V.C.. Ms. Relyea remembered M.J.B. having decided to proceed with the artificial insemination process prior to the commencement of M.J.B.'s relationship with V.C.. Ms. Relyea did not remember whether she had ever heard V.C. refer to herself

as a parent to the children, but did acknowledge V.C. having played an important role in the children's lives when the parties were together. However, according to Ms. Relyea, V.C. would usually only share in the household responsibilities when M.J.B. would ask her to, and not usually upon her own initiative.

Maria Irazarri also testified on M.J.B.'s behalf. Ms. Irazarri testified to having known M.J.B. prior to meeting V.C.. She recalled conversations she had had with M.J.B. about M.J.B. becoming pregnant via artificial insemination years before M.J.B. and V.C. became involved. Ms. Irazarri did not recall ever having heard V.C. refer to herself as a parent to the twins either before or after their birth, and did not know of M.J.B. having regarded V.C. as a co-parent to the children.

Both parties, had expert witnesses testify on their behalf. Dr. Allwyn J. Levine testified on behalf of the plaintiff, and Dr. David Brodzinsky testified for the defense. Both experts came to very similar conclusions after having examined both women and the two children. Each expert examined V.C. and M.J.B. individually and with the children as well as having interviewed the children individually.

After conducting his examination, Dr. Levine concluded both children view V.C. as a maternal figure and V.C. views the children as her own. Dr. Levine compared the relationship between V.C. and M.J.B. to a heterosexual marriage and said the children would be affected by the loss of V.C. in the same way children would be impacted if denied access to one parent after a divorce. He emphasized the benefit the

children received and would continue to receive via the bonded relationship with V.C.. Dr. Levine also testified as to the potential impact to the children's self-esteem by feelings of abandonment if they lost V.C. as a maternal figure. However, because the children are only three and a half and have lived apart from V.C. since they were two, Dr. Levine felt, the children would, if necessary, probably recover from the loss of V.C.. Dr. Levine also acknowledge the animosity between V.C. and M.J.B. as potentially detrimental to the children, but suggested counseling as a possible solution to improving relations between the parties.

Similarly, Dr. Brodzinsky found a bonded relationship to exist between V.C. and the children, which has been beneficial to the children. During his interviews with the children, they said they regarded V.C. as being a part of their family, which Dr. Brodzinsky said was normal for children of their age to express about a person with whom they have spent such a considerable amount of time. Dr. Brodzinsky felt the children may stop viewing V.C. as being a family member as they get older and learn more about biological relationships. Dr. Brodzinsky agreed it would be ideal for the children to maintain the bonded relationship with V.C., but feared the children would continue to be caught in the middle given the animosity between the parties. Dr. Brodzinsky agreed with Dr. Levine about the short-term distress the children would probably feel at the loss of V.C., but also felt the children would likely recover without any permanent damage. Dr. Brodzinsky disagreed with Dr. Levine about how the relationship between V.C. and M.J.B. should be viewed. Dr. Brodzinsky felt the loss of V.C. was not comparable to the loss of a parent in a heterosexual

divorce because, in a heterosexual relationship, society would reinforce the expectation for a relationship to continue between a child and parent post-divorce, whereas no similar expectation would exist for the relationship between V.C. and the children.

V.C. has petitioned this Court for joint legal custody of the two children with M.J.B. to retain residential custody. V.C. has also asked this Court to award her liberal visitation as well as regular phone contact with the children.

II. DISCUSSION OF ISSUES

Custody

Plaintiff argues she stood *in loco parentis* to the children from the time of their birth to the end of the relationship between herself and defendant. She claims her relationship to the children to be a "psychological parent," and, it would cause irreparable harm to the children to have such a relationship severed. Therefore, the plaintiff maintains, she should be awarded joint legal custody. In support of this position, plaintiff asserts the decision to have the children was a joint one. Additionally, plaintiff argues she not only assumed a co-parenting role after the children were born, but it was defendant's intention for the plaintiff to establish and maintain a such a relationship with the children. The plaintiff argues this intention was illustrated by the parties' decision to have the children call her "Meema," the naming of plaintiff as custodian for one of the children's bank accounts, the numerous cards from defendant and the children which refer to plaintiff as the children's mother, and most importantly, to the plan for plaintiff to adopt the children.

Appendix C

Plaintiff correctly recognizes she has no legal or biological ties to the children, and therefore, stands as a third party seeking joint custody of another woman's children. New Jersey Courts have typically held a third party seeking custody against the natural parent(s) must prove unfitness or abandonment by the parent(s) in order to terminate parental rights. *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, 129 N.J. 1 (1992); *Matter of Baby M*, 109 N.J. 396 (1988); *Guardianship of K.H.O.*, 308 N.J. Super. 432 (App. Div. 1998); *Zack v. Fiebert*, 235 N.J. Super. 424 (App. Div. 1989). New Jersey has maintained such a high standard because, "[t]he right of natural parents to the custody, care and nurturing of their children has risen to the stature of a fundamental right and deserves special protection." *Matter of D.T.*, 200 N.J. Super. 171, 176 (App. Div. 1985), citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). However, when a third party has stood *in loco parentis*, courts have held the third party's petition for custody and/or visitation is measured according to the best interest of the child(ren). *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, 129 N.J. 1 (1992); *Zack v. Fiebert*, 235 N.J. Super. 424 (App. Div. 1989); *Hoy v. Willis*, 165 N.J. Super. 265 (App. Div. 1978).

In determining whether a third party has stood *in loco parentis*, courts must examine whether the third party has been a "psychological parent" to the child(ren). *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, 129 N.J. 1 (1992); *Sees v. Baber*, 74 N.J. 201 (1977); *Zack v. Fiebert*, 235 N.J. Super. 424 (App. Div. 1989); *Hoy v. Willis*, 165 N.J. Super. 265 (App. Div. 1978); *A.S. v. B.S.*, 139 N.J. Super. 366 (Ch. Div. 1976). "Whether any adult becomes the

psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult but never by an absent, inactive adult . . . ." *Hoy v. Willis*, 165 N.J. Super. 265, 273 (App. Div. 1978). This was the case in *Hoy* where the paternal aunt petitioned for custody of her nephew, whom she had raised from the age of one and a half until six by herself. *Id.* at 268-69. Recognizing the child's aunt to have been the only parental figure the child had known for the past four and a half years, and the irreparable harm a separation from her would cause the child, the court decided the aunt should be awarded custody in the best interest of the child. *Id.* at 277.

However, courts have not held a third party to qualify as standing *in loco parentis* every time the third party participates in raising a child. *Zack v. Fiebert*, 235 N.J. Super. 424 (App. Div. 1989); *Matter of D.T.*, 200 N.J. Super. 171 (App. Div. 1985). The standard used to evaluate a third party's claim of custody depends upon the relationship between the third party and the child(ren). *Zack v. Fiebert*, 235 N.J. Super. at 432. A third party must prove to have stood *in loco parentis* in order to utilize the best interest test, otherwise, the standard test of unfitness or abandonment is appropriate. *Id.* at 433.

In *Zack*, the maternal grandparents sued the husband of their deceased daughter for custody of the two children born of a prior marriage but whom the husband had previously adopted. *Id.* at 426. The grandparents argued they had stood *in loco parentis* to the children because, during the two-year

period of their daughter's illness preceding her death, the grandparents had primarily raised and cared for the children. *Id.* Despite the grandparents' two years as primary caretaker, the court in *Zack* found the relationship had not risen to the level of *in loco parentis* and, therefore, the grandparents did not have a sufficient claim for custody. *Id.*

In the present case, V.C., like the grandparents in *Zack*, has not presented evidence to prove she functioned *in loco parentis* after the children were born. There is evidence the plaintiff participated in activities and responsibilities surrounding the children, but this participation has not been proven to rise to the level of co-parent. Testimony from witnesses indicated plaintiff would do the tasks defendant asked of her, but plaintiff would not usually initiate these tasks independently. Additionally, it was the defendant who made the decisions about the day care and pediatrician for the children. Although the defendant did shared her decisions with the plaintiff, there is no evidence the plaintiff had any influence in the making of those decisions. This Court would anticipate finding a long standing record of active and equal participation in decisions and responsibilities with the children within any successful claim of an *in loco parentis* relationship having been established.

The burden of proof for establishing whether a third party has stood *in loco parentis* lies completely with the third party. *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, 129 N.J. 1 (1992); *Zack v. Fiebert*, 235 N.J. Super. 424 (App. Div. 1989); *Hoy v. Willis*, 165 N.J. Super. 265 (App. Div. 1978). And, while there is evidence in the present case of the plaintiff enjoying a bonded relationship with the children,

the plaintiff has failed to establish the relationship to have risen to the level of *in loco parentis*. Although this Court could conceive of a situation where a relationship such as the one between plaintiff and defendant would give rise to a successful claim for joint custody and visitation, this is not such a case.

The decision to have the children was clearly the defendant's rather than a joint decision by both parties. At the time V.C. and M.J.B. first began to date, defendant had not only made an appointment with a doctor to begin the artificial insemination process, but had collected at least eight months worth of information so as to enable the doctor to track her ovulation pattern. Additionally, testimony from the defendant and other witnesses confirmed the medical evidence of the defendant's intention to undergo artificial insemination prior to the beginning of her relationship with the plaintiff.

Both experts testified as to the strong bonded relationship between the plaintiff and the children, but this relationship was not proven to go so far as to establish the plaintiff as a "psychological parent" to the children. Both reports indicate the children view the defendant's new partner as similar to the plaintiff and neither report has either child independently identifying the plaintiff as their mother when asked who their mother is. Given the level of importance surrounding the issue of custody of children, and the lack of definitive evidence, this Court is unwilling to impute a relationship of psychological parent upon the plaintiff. The present case lacks the kind of clear parental relationship between the plaintiff and the children which was present in other cases

where a claim of psychological parent was successfully argued. See *Matter of the Guardianship of J.C., J.C., and J.M.C., Minors*, 129 N.J. 1 (1992); *Hoy v. Willis*, 165 N.J. Super. 265 (App. Div. 1978); *A.S. v. B.S.*, 139 N.J. Super. 366 (Ch. Div. 1976).

Because the plaintiff failed to prove she stood *in loco parentis* and, functioned as a psychological parent to the children, this Court cannot proceed to analyze the present custody case under the best interest test. Absent a showing of plaintiff having acted *in loco parentis*, the Court would only be able to consider the plaintiff's petition for custody if the plaintiff was able prove the defendant to be an unfit parent. As this has not been alleged, nor is there any evidence to substantiate such a claim, the plaintiff's motion for joint legal custody must be denied.

In support of this conclusion, this Court points to the recently unpublished decision of *S.H. v. D.C.*, Docket No. A-474-97T5 (N.J. App. Div. August 3, 1998). *S.H.* involved a man who petitioned for custody of his former partner's biological children. Although S.H. had helped raise the children, neither child was biologically or legally related to S.H.. The Appellate Division upheld the trial court's ruling which found S.H. lacked standing to petition for custody because S.H. had no legal or biological ties to the children.

Even if this Court were to look to other jurisdictions' treatment of cases similar to the present one, the Court was able to uncover only one case in which a court found a non-biological partner to have acted *in loco parentis* and therefore had standing to petition for custody. See *J.A.L. v.*

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E.P.H., 453 Pa. Super. 78, 682 A.2d 1314 (1996). *J.A.L.* was factually very different from the present case, however, because the parties in *J.A.L.* had been together for nine years prior to having jointly decided the defendant would have a baby through artificial insemination. *Id.* at 81-82, 682 A.2d at 1316. Unlike *J.A.L.*, the decision to have the children in the present case was clearly made solely by the defendant prior to her having become involved with the plaintiff. Additionally, this Court has found far more cases in other jurisdictions where courts were unwilling to grant the petitioner custody, despite the parties having jointly made the decision to have a child. See *A.H. v. T.O.*, 673 N.Y.S.2d 989 (N.Y.A.D. 4 Dept. 1998); *West v. Superior Court, Lockrem*, 59 Cap. App. 4th 302, 69 Cal.Rptr.2d 160 (1997); *Titchenal v. Dexter*, 693 A.2d 682 (1997); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991); *Nancy S. v. Michele G.*, 228 Cal.App.3d 831, 279 Cal. Rptr. 212 (1991). Therefore, even after examining similar cases in other jurisdictions, this Court is unable to grant the plaintiff standing in her petition for custody.

Visitation

Plaintiff has compared her relationship with defendant to a heterosexual marriage and claims she should be given the same protection a stepparent would be given when seeking visitation of a stepchild. Plaintiff claims her right to equal protection and due process will be violated if this Court acts otherwise.

There is no basis for the relationship between the plaintiff and defendant to be afforded the same protection as a

heterosexual marriage because New Jersey does not recognize same-sex marriages. Therefore, the relationship between the parties is analogous to an unmarried couple involved in a committed relationship where one of the parties has a child not biologically linked to the other party, as in *S.H. v. D.C.*. Under such circumstances, it is irrelevant whether the parties are involved in a homosexual or heterosexual relationship.

Even if the relationship between the defendant and the plaintiff was legally comparable to a heterosexual marriage, a stepparent has no statutory right to visitation and any grant of visitation rights for a stepparent arise only under the principles of equity. *Klipstein v. Zalewski*, 230 N.J. Super. 567, 569 (Ch. Div. 1988). Furthermore, the New Jersey Supreme Court has held, "in most cases, when a stepparent who stands *in loco parentis* to a stepchild divorces that child's natural parent, the *in loco parentis* relationship is deemed terminated." *Miller v. Miller*, 97 N.J. 154, 162 (1984).

This principle was illustrated in *Klipstein*, where a stepfather petitioned the court to grant him visitation rights for his ex-wife's four-year-old daughter from a previous marriage. *Id.* at 570. The court held, "there must be some limits to stepparent visitation rights because in our society it is not difficult to conceive of a child having three, four or even more [stepparents] and there are not enough days in a week for the child to have visitation with all of them." *Id.* at 571. The *Klipstein* Court also found an agreement between the mother and stepfather for visitation to be, "at best only a factor to be considered in determining the visitation rights

of a stepparent." *Id.* at 576. The court went on to say, "a court under its *parens patriae* authority always has the duty and power to disregard agreements made by parents relating to children." *Id.*

The court in *Klipstein* recognized a stepparent's right for visitation under the doctrine of equitable estoppel if the stepparent was obligated to pay child support after the dissolution of the marriage. *Id.* at 574-75. The court found a stepparent would be obligated to pay child support if the stepparent stood *in loco parentis* and, "actively interfered" with the natural parent's ability to obtain child support from the other parent. *Id.* at 574, citing *Miller v. Miller*, 97 N.J. at 169. Absent these two elements, the *Klipstein* Court held a stepparent does not have an obligation to pay child support but, at the same time, the stepparent may not claim the natural parent is equitably estopped from denying visitation with the stepchild. *Id.* at 574-75.

Given existing case law surrounding stepparents visitation rights, even if the plaintiff were to be equated to a stepparent in a heterosexual marriage, the plaintiff would not satisfy the criteria for court ordered visitation rights. This Court has already found the plaintiff did not stand *in loco parentis*, but even if she had, such a relationship between a stepparent and stepchild is typically regarded as terminated once the relationship between the adults is ended. *Id.* at 574. Additionally, the defendant is making no demand for child support from the plaintiff. Although the plaintiff did pay child support when the relationship first ended, she was under no legal obligation to do so and, in addition, she was spending time with the children at the time.

Appendix C

Plaintiff urges this Court to adopt the reasoning of the Wisconsin Supreme Court in its decision to allow visitation to the former partner of a child's biological parent. See *Custody of H.S.H.-K.: Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419 (1995). In *Holtzman*, the court found the best interest of a child to be paramount to the biological parent's wishes. Furthermore, although there was no statutory basis for awarding visitation, the court found a circuit court did have the power to hear a visitation case if the petitioner could establish the existence of a parent-like relationship with the child, and a "significant event" having interfered with the parent-like relationship. *Id.* at 694, 533 N.W.2d at 435. The *Holtzman* Court went on to establish a four-part test for determining if a parent-like relationship existed between the petitioner and the child. *Id.*

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements:
>
> 1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> 2) that the petitioner and the child lived together in the same household;
>
> 3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the

> child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; (a petitioner's contribution to a child's support need not be monetary);
>
> 4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. *Id.* at 694-95, 533 N.W.2d at 435-36.

Plaintiff asserts this four-part test should be applied in the present case and, under this test, she should be awarded visitation in the best interest of the children. Were this Court to apply this test to the present case, the plaintiff would probably not succeed. Although the plaintiff testified the defendant encouraged and represented the existence of a parent-like relationship between the plaintiff and the children, the defendant asserted she encouraged a bonded relationship, but not a parental one. Not only was the testimony from the witnesses conflicting, but the plaintiff failed to prove the defendant encouraged a parental relationship as opposed to merely a bonded relationship. More troubling, however, is the third prong of the test, whether the plaintiff "assumed obligations of parenthood" and "took significant responsibility for the child[ren]'s care." Although there is no doubt the plaintiff cared for the children, the evidence does not reveal the plaintiff to have had an equal,

or in fact any say as to decisions concerning the children. According to the evidence, the defendant decided about both the children's pediatrician and day care and only later shared the information with the plaintiff. There was no evidence presented which established the plaintiff as a participant, to any substantial degree, in either of those decisions. The Court would expect a co-parent to participate in those types of decisions when "assum[ing] obligations of parenthood."

Even if this Court did decide to apply the *Holtzman* test, and the plaintiff was able to establish all of the requisite elements, the plaintiff must still prove visitation rights to be in the best interest of the children. According to *Matter of Baby M.*, ". . . the touchstones of visitation [are]: that it is desirable for the child to have contact with both parents; that besides the child's interest, the parents interests also must be considered; *but that when all is said and done, the best interests of the child are paramount.*" *Matter of Baby M*, 109 N.J. 396, 466 (1988) (emphasis added).

As with any petition surrounding the interests of a child, this Court must examine whether the interests of the children outweigh the wishes of the parent. If the best interest of the children mandated continued visitation with the plaintiff, this Court would order such visitation, even if it is against the defendant's wishes. *Id.*

As with any decision involving the best interest of children, the totality of the circumstances must be examined. Although the plaintiff maintains she harbors no grudges or animosity for the defendant, the same cannot be said for the defendant towards the plaintiff. It is clear the defendant

resents the plaintiff's presence in her life and this attitude is inevitably passed along to the children. During Dr. Brodzinsky's interview with the children, the children reported they had been told to say they no longer wished to visit the plaintiff by the defendant and her new partner. Clearly this is not desirable behavior from the defendant, but nonetheless, it is an example of the children being placed in the middle of the animosity between the parties.

Additionally, the children in this case are only three and a half and have been living apart from the plaintiff since they were approximately two years old. Both Dr. Brodzinsky and Dr. Levine testified a complete severing of the relationship with the plaintiff would probably cause short-term anxiety for the children, but the long-term effects were merely speculative. Both experts felt there could be some long-term impact on the children's self-image, but both also agreed the impact would be lessened and/or deferred by the children's relationship with the defendant as well as their relationship with the defendant's new partner.

Although the Court does recognizes the benefit the children receive from the relationship with the plaintiff, the Court does not find this benefit to outweigh the detriment caused by the animosity between the parties. Had the plaintiff enjoyed a longer and more irreplaceable relationship with the children this Court might have found the best interests of the children to mandate continued visitation between the plaintiff and the children. But, given the young age of the children and the animosity felt for the plaintiff by the defendant, this Court finds it would not be in the best interest of the children to maintain visitation with the plaintiff.

Appendix C

III. ORDER

IT IS therefore, on this day of September, 1998,

ORDERED, that in the best interest of the children, custody to plaintiff be, and the same is hereby, denied; and it is

FURTHER ORDERED, that in the best interest of the children, visitation with plaintiff shall be, and is hereby, terminated, effective immediately; and it is

FURTHER ORDERED, that in the best interest of the children, all further contact between the plaintiff and the children of defendant, shall cease immediately; and it is

FURTHER ORDERED, that a copy of this Order shall be forwarded to all interested parties within 7 days of the date hereof.

s/ Philip B. Cummis
PHILIP B. CUMMIS J.S.C.

APPENDIX D — STATUTORY PROVISIONS INVOLVED

N.J.S.A. § 9:2-7.1

N.J.S.A. 9:2-7.1 — Visitation rights for grandparents or siblings

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The relationship between the child and the applicant;

(2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;

(3) The time which has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and

(8) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

* * *

N.J.S.A. § 9:3-43

N.J.S.A. 9:3-43 — Who may institute action; consent of spouse; qualifications; waiver

a. Any person may institute an action for adoption except that a married person may do so only with the written consent of his spouse or jointly with his spouse in the same action or if living separate and apart from his spouse.

b. A plaintiff, at the time of the institution of the action, shall have attained the age of 18 years and shall be at least

10 years older than the child to be adopted, except that the court for good cause may waive either requirement, which waiver shall be recited in any judgment of adoption thereafter entered.

* * *

N.J.S.A. § 37:1-10

N.J.S.A. 37:1-10. — Common law and other marriages without license; validity

Nothing in this chapter shall be deemed or taken to render any common law or other marriage, otherwise lawful, contracted before December first, nineteen hundred and thirty-nine, invalid by reason of the failure to take out a license as herein provided. But no marriage contracted on and after December first, nineteen hundred and thirty-nine, shall be valid unless the contracting parties shall have obtained a marriage license as required by section 37:1-2 of this Title, and unless, also, the marriage, after license duly issued therefor, shall have been performed by or before any person, religious society, institution or organization authorized by section 37:1-13 of this Title to solemnize marriages; and failure in any case to comply with both prerequisites aforesaid, which shall always be construed as mandatory and not merely directory, shall render the purported marriage absolutely void.

* * * *

(2)

No. 00-41

Supreme Court, U.S.
FILED
AUG 30 2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

M.J.B.,

Petitioner,

—v.—

V.C.,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Does the Due Process Clause of the federal Constitution prevent state law from directing that children be allowed to visit with an adult who, with the consent of their biological parent, established a bonded parental relationship with them, who lived with them, and who assumed the day to day responsibilities of a parent for their care, education, emotional and financial support?

LIST OF PARTIES

Initials were used to denote the parties in the New Jersey Supreme Court, and are being used in this Court as well. The parties' full names are contained in the pleadings of the Superior Court, Chancery Division, Family Part, Essex County, New Jersey.

Petitioner (Defendant in Superior Court): M.J.B.

Respondent (Plaintiff in Superior Court): V.C.

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JURISDICTION

Petitioner has properly invoked jurisdiction under 28 U.S.C.§1257(a).

STATUTORY PROVISIONS INVOLVED

N.J.S.A. § 9:2-3: When the parents of a minor child live separately, or are about to do so, the Superior Court, in an action brought by either parent, shall have the same power to make judgements or orders concerning care, custody, education and maintenance as concerning a child whose parents are divorced....

N.J.S.A. § 9:2-4: The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal....

N.J.S.A. § 9:2-13(f): The word "parent," when not otherwise described by the context, means a natural parent or parent by previous adoption.

STATEMENT OF THE CASE

A. The Relationships That Gave Rise To The Case

Although, as petitioner says, some aspects of the relationships at the heart of this case were vigorously disputed, the New Jersey Supreme Court found that the following facts were established at the trial in this case (*cf.* Sup.Ct. Rule 15.2). 163 N.J. at 206-212; Certiorari Petition, Appendix A, pp. 2a-7a ("App.").

The two women who are the parties in this case, V.C. and M.J.B., met in 1992 and began dating on July 4, 1993. M.J.B. started seeing a fertility specialist a few days later. She told V.C. about her decision to have children in September. V.C. and M.J.B. moved in together in December. Two months later, M.J.B. learned that she was pregnant. She called V.C. at work to tell her the good news. Later M.J.B. would learn she was having twins. 163 N.J. at 206, App. A, pp. 2a-3a.

V.C. and M.J.B. attended pre-natal and Lamaze classes together. In April 1994, they moved to a bigger apartment to accommodate the pending births. The children were born on September 29, 1994. V.C. took M.J.B. to the hospital. V.C. was present in the delivery room, and the hospital staff treated her as if she were a mother. Immediately after the birth, the nurses gave one twin to M.J.B. to hold and one to V.C. 163 N.J. at 207, App. A, p. 3a.

V.C. and M.J.B. opened joint bank accounts for their household expenses, prepared wills, powers of attorney, and named each other as the beneficiaries of their life insurance policies. They also opened savings accounts for the children, naming V.C. as custodian on one account and M.J.B. as custodian on the other. 163 N.J. at 207, App. A, pp. 3a-4a.

V.C. and M.J.B. decided that the twins would call M.J.B.

"mommy" and V.C. "meema." M.J.B. concedes that she referred to V.C. as the "mother" of the children. During the 23 months after the children were born and before she ended her relationship with V.C., she supported the notion, both publicly and privately, that she, V.C. and the children were a family unit. She told V.C. and others she considered V.C. the children's mother. M.J.B. sent cards and letters to V.C. that referred to V.C. as the children's mother and indicated that the four of them were family. She listed V.C. as the "other mother" on the children's pediatrician and day care registration forms. She gave V.C. medical power of attorney over the children. Labels aside, in fact both parties cared for the children, and V.C. assumed substantial responsibility for them. At trial, experts for both parties would testify that V.C. had a bonded relationship with the children, with V.C.'s expert saying she was a "maternal figure" and M.J.B.'s believing the children saw her as a member of their family. 163 N.J. at 207-208, 210-212, App. A, pp. 4a-5a, 7a-9a.

V.C. and M.J.B. bought a home together in February 1995. Later that year, V.C. asked M.J.B. to marry her, and M.J.B. accepted. In July, they held a commitment ceremony at which V.C., M.J.B. and the children were blessed as "family." V.C., M.J.B. and the twins attended family functions, holidays and birthdays. The twins called V.C.'s mother "grandma" and her grandmother "great-grandma." V.C. and M.J.B. joined an association of lesbian and gay families and attended at least ten of their functions. 163 N.J. at 209, App. A, pp. 5a-6a.

V.C. and M.J.B. discussed changing the twins' surname to a hyphenated form of their last names. They also discussed the possibility of V.C. adopting the twins (a process permitted under New Jersey law, *see* N.J.S.A. § 9:3-43(a) ("Any person may institute an action for adoption... ."); *see also Adoption of Two Children by H.N.R.*, 285 N.J.Super. 1, 666 A.2d 535 (1995) (statute which permits "any person to institute an action for

adoption" includes unmarried couples, either heterosexual or homosexual)). In June 1996 they consulted an attorney, paid a retainer and got advice about how to start the process. They had taken no further steps when M.J.B. ended her relationship with V.C. just two months later. 163 N.J. at 209-210, App. A, pp. 6a-7a.

V.C. and M.J.B. took turns living in the house with the children until November 1996. In December, V.C. moved out. V.C. continued to visit with the twins until May 1997. During that time, V.C. spent roughly every other weekend with the twins, and contributed money toward the expenses of the household. In May, M.J.B. went out of town on business for two weeks, leaving the twins with V.C. After returning, she cut off all contact between V.C. and the twins, and at some point stopped accepting money from V.C. 163 N.J. at 210, App. A, p. 7a. In July, V.C. filed the petition that gave rise to this case.

B. Proceedings Below

V.C.'s petition sought joint legal custody of the twins; that is, she asked the court to order regular visitation, and joint decision making. She did not seek physical custody of the children. 163 N.J. at 210 and at n.2, App. A, p. 7a and at n.2.

At trial, the court heard testimony from nine witnesses. Both V.C. and M.J.B. took the stand. Both called expert witnesses who had examined the women individually, with the children and who had examined the children separately. V.C.'s mother testified, as did four family friends. 163 N.J. at 208-209, 210-212, App. A, pp. 5a, 7a-9a.

The trial judge recognized that an individual who is neither a biological nor an adoptive parent can nonetheless have a parental relationship with a child under New Jersey law. Relying on cases from the Appellate Division, he concluded that V.C. was not a parent under New Jersey law, and that state law

therefore did not give her the right to bring an action for custody or visitation. In reaching that conclusion, the judge gave significant weight to the fact that the decision to have children was M.J.B.'s, and not a joint decision. 163 N.J. at 212-213, App. A, pp. 9a-10a; and *see* Cert. Pet., App. C at pp. 105a-109a.

A divided Appellate Division reversed. The majority held that V.C. had established that she had a parent-child relationship with the twins for the purposes of New Jersey law. Based on the record developed in the trial court, the Appellate Division ruled that joint legal custody would not be in the best interests of the children. Relying on the testimony of both experts, the court held that visitation was in the children's best interests, and remanded the case for proceedings to establish a visitation schedule. 163 N.J. at 213, App. A, p.11a; and *see* App. B, p. 55a-68a.

There were two partial dissents, taking opposite positions on the issues. One judge agreed that V.C. was a parent under New Jersey law, but would have remanded for a further hearing on whether custody might be appropriate. The other judge, again recognizing that neither biology nor an order of adoption is essential to parenthood under New Jersey law, believed a test different than that used by the majority should apply. Using his analysis, V.C. would not have been a parent, so he would have affirmed.163 N.J. at 213, App. A, p.11a, and *see* App. B, p. 69a-94a.

The New Jersey Supreme Court unanimously affirmed the decision of the Appellate Division. Writing for the court, Justice Long announced a four part test for deciding when an individual who is not biologically related to a child and has not obtained an order of adoption has a parental relationship with the child. To be recognized as a parent, the court held, an individual must prove: (1) that a biological or adoptive parent consented to and fostered the formation of a parent-like relationship between

the individual and the child; (2) that the individual lived in the same household with the child; (3) that the individual assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributions toward the child's support; and (4) that the individual established a bonded, dependent, parental relationship with the child. 163 N.J. at 223, App.A, pp. 24a-26a.

The court went on to hold that V.C. had met her burden on all four points, and had a parent-child relationship with the twins under New Jersey law. The court observed that the issue of joint physical custody was not before it because V.C. had not sought it. Observing that V.C. had not been involved in decision making for the twins in the nearly four year pendency of the case, the court ruled that it would be too disruptive to alter the arrangement, and thus declined to order joint legal custody. But, noting that V.C. had been visiting with the twins during the case, the court ruled that it was in the twins best interest that regular visitation continue. 163 N.J. at 229-230, App. A, 33a-34a

REASONS FOR DENYING THE WRIT

A. Introduction

The New Jersey Supreme Court ruled as a matter of state law that V.C. had a parent/child relationship with the twins she and M.J.B. raised together after finding:

(1) that M.J.B. consented to V.C. forming a parent-like relationship with the children, and actively promoted it;

(2) that V.C. lived with the children in one household, as a family;

(3) that V.C. assumed the obligations of a parent, taking significant responsibility

for the care, education and development of the children, and contributing toward their support;

(4) that V.C. had a bonded parental relationship with the children, who were dependent on her. 163 N.J. at 229, App. A, p. 33a.

The court ordered that V.C. be allowed visitation with the children. 163 N.J. at 229, App. A., p.34a.

M.J.B. asks this Court to rule as a matter of federal constitutional law that no matter what New Jersey law says, V.C. does not have a parent-child relationship with the children and may not be granted visitation. Cert. Pet. at 3. M.J.B. urges this Court to find in the Due Process Clause of the Fourteenth Amendment, two new limitations on the discretion of state courts in cases about parenting and visitation. Essentially, petitioner asks that this Court announce a *per se* rule (1) that only someone related biologically to a child may be said to be a parent under state law; and (2) that no one other than a parent may be granted visitation with a child unless the child's parent is unfit or the parent's decision to deny visitation has or would cause serious harm to the child. Cert. Pet. at 12-15.

B. Questions About The Limits Which The Federal Constitution May Place On State Law Decisions About Visitation And Parenting Are Not Well Posed By This Case

The rule that M.J.B. requests is extreme; it would overturn large bodies of existing state law. But the facts of this case do not lend themselves to the formulation of more temperate constitutional doctrine. Moreover, because the federal constitutional issue M.J.B. urges here was hardly developed at all in the New Jersey courts, this case does not provide this

Court with the kind of thoughtful treatment of the issues which it ought to have before it considers a relatively unexplored area of constitutional law.

The state courts, which have to deal with disputes about parenting and visitation day in and day out, have adopted several different analytic models for resolving them. Those analytical frameworks are typically flexible, circumstance dependent, and fact intensive.

For example, many courts hold that a man who is neither a biological nor an adoptive parent, but who is shown to have acted as a parent and held himself out as a parent, may not invoke the lack of a biological or adoptive tie to escape support obligations.[1] Courts have held that children and adults related by neither blood nor adoption, were, once a parent-child relationship was proven, to be regarded legally as parent and child for the purposes of determining support obligations from child to parent[2], from parent to child,[3] and from each to the other.[4]

Many courts have also ordered visitation, over the objection of a parent, to individuals who were neither adoptive nor biological parents when they were able to prove that they

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1. *See, e.g., Wener v. Wener*, 35 A.D.2d 50, 312 N.Y.S.2d 815 (2d Dep't 1970); *see also Jensen v. Jensen*, 13 N.J.Super 155, 80 A.2d 244 (1951) and *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn. App. 1984).

2. See *Sparks v. Hinckley*, 5 P.2d 570 (Utah 1931).

3. *See Maguinay v. Saudek*, 37 Tenn. 146 (1857).

4. *See Eaves v. Feares* 64 S.E. 269 (Ga. 1908); *see also London Guarantee & Accident Co. v. Smith*, 64 N.W.2d 781 (Minn. 1954) (granting parental immunity for negligence to stepparents because they assumed the duties of parents).

had in fact acted as the child's parent.[5] The decision in this case, holding that a women's same sex partner had developed a parent-child relationship with children they raised together, does not by any means stand alone.[6]

Cases involving state law determinations that someone other than a biological or adoptive parent was in fact a parent have come to this Court before without provoking any apparent concern that the state in question had transgressed a fundamental constitutional right. Indeed, the relationship of a child and the nonbiological, nonadoptive parent who cared for her is invoked regularly as a leading exemplar of the kind of parent/child relationship the Constitution protects. *See Prince v. Massachusetts*, 321 U.S. 158, 159, 164-167. (1944) (Sarah Prince, the parent in *Prince*, was the "aunt and custodian" of Betty Simmons, the child).

And as this Court noted only last term in *Troxel v. Granville*, every state now has some form of statute which allows visitation in some circumstances to individuals who are not in any sense parents under state law. *See Troxel v. Granville*, ___U.S.___, ___, 120 S.Ct. 2054, 2064, n.1 (2000).

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5. *See Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D. 1996)(court may grant visitation to mother's ex-husband because he was only father child knew in seven years of life); *see also Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App. 1996)(similar); some courts have gone even farther, *see, e.g., In re Adoption of Young*, 364 A.2d 1307 (Pa. 1976)(mother estopped from terminating former husband's parental rights, even though he was not in fact biological father, because he had acted as father and been treated as father by the mother); *see also In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995).

6. *See Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)(applying the four factors also used in this case to decide if biological mother's lesbian former partner was entitled to visitation as a parent); *see also J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct. 1996)(biological mother's lesbian former partner could make case for visitation if she first proved she functioned as parent of the child; *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)(same).

While some of these laws apply only to grandparents, others are more general and apply to those who have a significant relationship with a child.[7]

All of these decisions and statutes would be swept aside by the federal constitutional rules which M.J.B. proposes. In place of detailed inquiry into the particular facts about relationships between adults and children, she would have this Court place an absolute federal rule that only those who are related by biology can have a parental relationship with a child, and visitation with nonparents can never be required absent unfitness or serious harm. *See* Cert Pet. at 12-15. Her test would, in short, supplant significant portions of the state law of domestic relations with a new federal law of domestic relations, something this Court has already suggested would be unwise, *see Troxel v. Granville*, 120 S.Ct. at 2064.

Moreover, this is hardly the case in which to explore whether some constitutional rule other than that proposed by M.J.B. should limit state law rules about parenting and visitation. Just as the Due Process Clause of the federal Constitution places some limits on when a state may refuse to include an individual within its definition of who is a parent (*see Stanley v. Illinois,* 405 U.S. 645 (1972)) or who may be awarded visitation over the objections of a parent (*see Troxel v. Granville*, 120 S.Ct. at 2059-61, 2064), it probably places some limits on the circumstances in which a state may decide that an adult has a parental relationship with a child and order visitation. The much discussed but as yet unmaterialized case of the day care worker whom a state court deems a parent would doubtless

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7. *See, e.g.*, Ariz. Rev. Stat. §25-415(G)(1)(West 2000)(requiring a substantial relationship), Minn. Stat. § 257.022(2b)(West 1999)(requiring that the adult and the child have lived together), Tex. Fam. Code § 102.003(a)(9)(West 1999)(same), and 1999 Nev. Stat. 125A.330(3)(1) (requiring that adult had previously provided financial support for the child).

be an example, if it ever happened. *See* Cert. Pet. at 10.

But this case does not begin to approach those limits, whatever they may be. V.C. is not a day care worker, or a nanny or a family friend. Under the richly nuanced tests developed by the courts of New Jersey, applied after a full trial with detailed testimony, V.C. is a woman who, with M.J.B.'s consent and encouragement, forged a parent-child bond with the children with whom she lived, for whom she cared, and whom she supported, emotionally and financially.

Finally, this case does not give this Court the kind of record which it ought to have before it explores the limits which the federal Constitution puts on state law rules about parenting and visitation. It is true that, at least in passing, petitioner asserted a federal constitutional right to control the upbringing of the twins. *See* New Jersey Supreme Court, Brief of M.J.B., at pp. 29, 30. But in each instance, she followed her mention of the federal Constitution with the insistence that absent "a statutory basis for jurisdiction" or "common law precedent" the New Jersey court should not allow any one like V.C. to demonstrate that in fact she had a parental relationship with a child. *See* Brief of M.J.B. at pp. 30, 31. Her brief reads as if she is arguing not that her federal constitutional rights are being violated, but rather in support of a policy argument about how the New Jersey Supreme Court should interpret the statute before it.

Given the way M.J.B. mentioned the federal Constitution, it is hardly surprising that there was no discussion at either the Appellate Division or at the New Jersey Supreme Court about how and why the Due Process Clause of the federal Constitution ought to limit the ability of states to define parents either in the way M.J.B. suggests, or in some other way. That lack of discussion leaves crucial questions about the consequences of the rules M.J.B. seeks completely unexplored.

For example, M.J.B. speaks in her petition to this Court of the exclusive rights of biological parents. She does not say if she thinks those whom state law deems parents by virtue of an order of adoption are similarly not parents for federal constitutional purposes. That is a position which, if adopted by this Court, would work a cataclysmic upheaval in families across America. But she also does not suggest why, if parents by adoption are to be treated like biological parents, the Due Process Clause would draw a distinction between two different court proceedings which can bring about an order that one is a parent under state law, condemning a proceeding like the one in this case which involves a full evidentiary hearing with the right to call and cross examine witnesses, while approving the far more informal proceedings typically used in adoptions.

Because M.J.B. did not seriously argue the constitutional issue she advances now to either the Appellate Division or the New Jersey Supreme Court, this Court does not have the benefit of the thinking of any other court on whether, how and why the Due Process Clause should be setting the basic rules for the states on parenting and visitation. The process of exploring the very complex constitutional issues M.J.B. poses should not begin in this Court. *See McCray v. New York*, 461 U.S. 961, 963 (Stevens, J., joined by Powell and Blackmun, J.J., opinion explaining vote to deny *certiorari* because Court's consideration of novel constitutional issue would benefit from further development in lower courts).

Because the rule M.J.B. poses would work an extreme change in the day to day operations of state courts, because the facts of this case do not properly frame any questions about whether the Constitution might require some more modest limit on state courts than the one M.J.B. proposes, and because these issues are in effect raised seriously for the first time in this Court, this is not an appropriate case for *certiorari*.

C. The Decision Of The New Jersey Supreme Court In This Case Is Not Inconsistent With This Court's Decision In *Troxel v. Granville*

For two distinct reasons, this Court's decision last term in *Troxel v . Granville* has no direct bearing on this case.

First, *Troxel* involved a statute which used "best interests of the child" to sort out visitation disputes between parents and third parties. The New Jersey statute at issue in this case uses the best interests standard to sort out visitation disputes between two parents. N.J.S.A. § 9:2-3 (West 2000). Ultimately, this Court condemned the Washington state statute at issue in *Troxel* because it gave no deference at all to the views of a parent in a dispute with a nonparent. *See Troxel v. Granville*, 120 S.Ct. at 2061. Nothing in *Troxel* remotely suggests that the Due Process Clause requires a state to give deference to the views of one parent over another in a dispute between parents. And nothing in *Troxel* speaks directly or indirectly to boundaries on whom a state may decide has a parental relationship with a child.

Second, putting aside for a moment the New Jersey Supreme Court's determination that V.C. is a parent, the process that court used to decide if V.C. could seek visitation could not be more different than the process at issue in *Troxel.*

This Court described the Washington state statute which it struck down in *Troxel* as "breathtakingly broad." The statute allowed "*[a]ny person*" to file a petition for visitation "*at any time*" and it empowered the court to grant the petition whenever it thought visitation would serve "*the best interests of the child.*" *Id.* (emphasis in this Court's opinion).

The New Jersey statute at issue in this case allows a petition to be filed only when the parents of a minor child begin to live separately, or are about to separate. N.J.S.A. § 9:2-3. As construed by the New Jersey Supreme Court, for an individual

like V.C. to obtain the right to seek visitation, she must prove that she has a bonded parent/child relationship with the child in question, that the child is dependent on her, that the biological parent consented to the formation of the relationship and promoted it, that she lived with the child, and that she took significant responsibility for the child's care, education and development, including both financial and emotional support. 163 N.J. at 223.

This is not a case in which a state has said that *any person* may petition for visitation; on the contrary, only one who has proven that she is an integral part of the child's life, and has the same sort of day to day practical, emotional, and financial relationship that a parent ought to have with a child may petition. This is not a case in which a state has paid no heed to the wishes of a biological parent. No petition will be entertained until the individual seeking visitation proves that the biological parent consented to the formation of that day to day parent-child relationship and indeed fostered its development into a bonded, dependent relationship. 163 N.J. at 223.

If *Troxel* speaks to this case at all, it is to suggest that this Court has serious reservations about imposing on state courts, as a matter of federal constitutional law, the kind of *per se* rules M.J.B. wants. As the *Troxel* opinion put it:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 9 (dissenting opinion). Because much state-court adjudi-

> cation in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter. [footnote omitted].

Troxel v. Granville, 120 S.Ct. at 2064.

The New Jersey Supreme Court's decision in this case violates neither the letter nor the spirit of this Court's decision in *Troxel.*

D. There Is No Significant Conflict Among State Courts On The Federal Constitutional Question Petitioner Poses

Petitioner tells this Court that the New Jersey Supreme Court's decision in this case conflicts with the decisions of other state courts. It is true that there is disagreement among state courts about how to define parental relationships and when to award visitation, although there are more courts aligned with the New Jersey Court's decision than petitioner cares to acknowledge. Cert. Pet. at 12, 14-15; and *see Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999), and *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa.Super.Ct. 1996); *see also Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), *Quinn v. Mouw-Quinn*, 552 N.W.2d 843 (S.D. 1996) and *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill.App. 1996), to name a few.

But for the most part, the conflict is over how *state* law defines a parent, and when *state* law permits visitation. *See* e.g. *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991)(the principal case on which M.J.B. relies). Some would view the disagreement about state law among these courts as a reflection of a healthy federal system in operation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis,

J., dissenting). In any case, disagreements among state courts about matters of state law are hardly a reason for this Court's intervention.

One of the cases to which petitioner points as a part of the purported conflict–*Ronald F.F. v. Cindy G.G.*, 70 N.Y.2d 141, 517 N.Y.S.2d 932 (1987)–holds that Due Process Clause of the federal Constitution requires that the state have a compelling interest to order visitation over the objections of a biological parent. It finds on the facts before the court that the state has no such interest. *Ronald F.F. v. Cindy G.G.*, 70 N.Y.2d at 144-145, 517 N.Y.S.2d at 934. The discussion of the issue takes two sentences, and involves virtually no analysis. The court in *Ronald F.F.*, like the New Jersey Supreme Court in this case, did not take up the question of whether the Due Process Clause limits state definitions of who is a parent at all. *Ronald F.F. v. Cindy G.G.* 70 N.Y.2d at 144-145, 517 N.Y.S.2d at 934.

It is far from clear that the decision in *Ronald F.F.* and the decision in this case are in conflict at all. There is no necessary inconsistency between the "exceptional circumstances" Due Process analysis used by the New Jersey Supreme Court in this case and the compelling interest test used by the New York Court in *Ronald F.F.* Compare, 163 N.J. at 219 with 70 N.Y.2d at 144-145. And in any event, the decision in this case and the decision in *Ronald F.F.* hardly provide the kind of focused, serious disagreement about a constitutional question that would provide a rationale for intervention by this Court. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Powell and Blackmun, J.J., commenting that *certiorari* was properly denied in case about constitutional limits on use of preemptory challenges to exclude members of minority groups from juries until the issue was more fully developed in state courts which had been considering it).

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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